ENFORCEMENT OF SECTION 647(b) OF THE CALIFORNIA PENAL CODE BY THE LOS ANGELES POLICE DEPARTMENT

Prostitution and the Police

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INTRODUCTION

Portions of this study actually began back in December, 1972. On December 11 one of the researchers contacted the Los Angeles Police Department. Thomas Coleman identified himself as a citizen concerned with the recent rise in serious crime in the city. He requested information concerning the allocation of manpower in relation to the seriousness of the crime. He stated that he was particularly interested in the enforcement of "victimless crimes" by the Los Angeles Police.

Coleman's first conversation was with Officer Spayth in the Public Relations Department. Officer Spayth explained that each Division of the L.A.P.D. has a vice unit which is mainly limited to enforcing laws within that particular jurisdiction. In addition to these separate units, there is an "Administrative Vice" division which can patrol the entire city. Spayth added that each vice unit enforces laws regulating gambling, A.B.C. violations, prostitution, "homosexuality" and lewd conduct. Vice officers are taken from the ranks of patrolmen. Usually, when a vice officer is assigned to vice patrol he remains in that capacity for a period of 18 months. Male vice officers are used almost exclusively to enforce these laws. When female officers are used, which is seldom, they generally work on pornography cases. Officer Spayth further emphasized that it is the current policy of the Department to place emphasis on arresting female prostitutes rather than their male customers. He justified this policy by explaining that it was the concern of the Department to eliminate prostitution and that this goal could be met by strictly arresting the prostitutes. Spayth further added that majoy policy decisions (such as the number of women used on vice units or the type of arrests that should be made) come from the office of the Chief of Police.

Coleman had further conversations on December 11 with Officer Healy (Rampart Division), Officer Rembald (Hollywood Division) and Officer Madris (Central Division). In these conversations it was discovered that in these 3 divisions

ere are approximately 575 patrolmen. Of this total 5 are women.

The fact that women are not used on patrol and in various other capacities has currently caused a controversy in Los Angeles. On March 16, 1973, Sgt. Fanchon Blake, a 25 year veteran of the department, filed charges with federal and state authorities accusing the Los Angeles Police Department of discriminating against women in violation of the Civil Rights Act. "Sgt. Blake told (police) commission representatives that policewomen presently cannot be promoted above the rank of sergeant or Investigator II, that their assignments are restricted, that no policewomen have been hired since Davis became Chief..." Los Angeles Times, March 17, Part II, page 1.

We have collected the names of over 150 vice officers working within seven of the divisions of the police department. These officers were employed in this capacity during the months of June through December, 1972. None of these officers are women.

RESEARCH METHOD

This study concerns the enforcement of section 647(b) of the California Penal Code by the Los Angeles Police Department. Section 647(b) prohibits soliciting or engaging in prostitution. The sample is limited to complaints filed in Division 81 of the Los Angeles Municipal Court for the period of December, 1972 through January, 1973. Division 81 services several of the Divisions of the L.A.P.D. including, Hollywood, Central, Rampart, Newton, Wilshire, Southwest, Northeast and 77th.

During this two month period there was a total of 376 complaints filed by the City Attorney for alleged violations of section 647(b). We reviewed 304 or 81 percent of all complaints filed. The remaining complaints were not available for review because cases were at trial or the paperwork was otherwise in transit. However, all cases which were available in the Clerk's office were carefully reviewed. In reading the complaints and the police reports the researchers noted the following information:

1. Case number
2. Date complaint was filed
3. Name of offender
4. Gender of offender
5. Arresting officer's name and serial number
6. Police division in which arrest was made
7. Complaining witness
9. Location of arrest
10. Disposition of case
11. Type of offense: soliciting or engaging

TYPE OF OFFENSE
(see statistical breakdown)

The overwhelming number of arrests were for soliciting. Most were the result of a direct conversation on the street between a person and a plainclothes vice officer. The conversation usually went as follows:

Person: "Hi, what are you up to tonight?"
Officer: "Oh, not too much."
Person: "Would you be interested in having some fun?"
Officer: " What do you mean by 'fun'?"
Person: "You know, I could take care of you."
Officer: "Well, how would you take care of me?"
Person: "I could ____you or I could ____you."
Officer: "What do you charge?"
Person: "I charge $----for_____and $----for ______."

In many cases the solicitor was very cautious and would only reluctantly explain to the officer what he would get for his money.

Only 7 of the solicitation arrests were the result of a newspaper ad. In these cases the officer would make arrangements to meet the person at a specific location. Once at the place the officer would start a conversation and eventually get propositioned. These arrests invariably occurred at private residences.

In over 95 percent of the cases the only victim of the solicitation was a plainclothes vice officer. The remaining 5 percent involved no victim at all. In the non-victim cases the officer would follow a suspected man and woman to a motel room. The officer would stand outside the door and listen to the conversation inside. He would usually report that he had overheard the following conversation:

Man: "Well, take your clothes off."
Woman: "Before I ____you, I want my money."
Man: "How much do you want?"
Woman: "I want $----".
Man: "O.K., now here it is, get undressed!"

Upon hearing that conversation the officer would get the pass key from the manager and would enter the room to make the arrest.

Most of the cases involved a specific amount of money. However, one case was noteworthy because it involved "other consideration". In that case, Officer Bosse of the Hollywood Division was patrolling the Sunset and LaBrea area in an unmarked car. He pulled over to a bus stop and asked the woman on the bench if she wanted a ride. At first she hesitated, but then she reconsidered. She got into his car and told him that she was going to such-and-such a street. Officer Bosse stated that he was not going that far. The woman then stated: "I'll let you 'screw' me if you take me all the way." Officer Bosse then arrested the woman for a violation of section 647(b).

METHOD OF ENFORCEMENT
(see statistical breakdown)

The overwhelming majority of all arrests made involved a plainclothes vice officer as the only complaining witness. Only 13 arrests (5 percent) were made by uniformed officers. In most cases, when the arresting officer was uniformed the arrest was of the motel room eavesdropping variety.

In only three cases was the complaining witness a private citizen. However, in all three cases the witness was the same person. It appears from the arrest reports that he was working for the police in the Wilshire Division as an informant. On one occasion he was accompanied by Officers Nelson and Genteel to a massage parlor. The officers waited outside while the informant entered the building. He then paid the cashier and was directed to a room. He undressed and the massuese entered. She would massage his back and then request that he turn over. She would continue to massage his legs and chest, but requested more money to "go further". He would give her some additional money. She would apply some lubrication to his pubic area and would masturbate his erect penis until he ejaculated. The informant then dressed and informed the officers of the violation. They took his statement and secured an arrest

warrant. This same procedure was followed on two other occasions with the assistance of Officers Sprankle and Galloway. On all three occasions the informant allowed the masseuse to masturbate him to the point of ejaculation. On one occasion the defendant was found not guilty at trial while on the second the case was dismissed.

CATEGORIZATION OF OFFENDER
(see statistical breakdown)

The majority of the persons arrested were either female or were homosexual males. Only 13 (4 percent) of those arrested were heterosexual males. In virtually all the cases where the defendant was a heterosexual male the arresting officer was uniformed.

In at least 4 of the cases reviewed, while both the man and woman were caught by the officers engaging in prostitution, only the woman was arrested. In one of these cases, Officers Stovall and Ramsdale were on footpatrol in the Central Division (downtown L.A.). They observed 2 marines approach a woman on the street. They eventually met up with a second woman. The two men and the two women walked to a nearby motel while the officers followed. The two couples went to a room which was registered to the marines. The officers stationed themselves outside the door to listen. With their ears to the door, the officers overheard a solicitation. They obtained a pass key from the manager and entered the room. The officers observed each marine engaged in a sexual act with a woman. The marines admitted to the officers that they had picked up the women and had paid them for sexual services. The officers arrested the women and let the men go free. One woman received 180 days in jail and the other received a sentence of 60 days.

Focusing on the <u>heterosexual situation</u> of all persons arrested 205 were women and 13 were heterosexual males. Since our society is comprised of approximately equal numbers of heterosexual males and females this ratio seems rather disproportionate.

Focusing on the <u>homosexual situation</u> of all males arrested 87 percent

were homosexual while only 13 percent were heterosexual violations. Since the Kinsey statistics indicate that approximately 4 percent of the adult male population is homosexual, these figures also seem grossly disproportionate.

DISPOSITION OF CASES
(see statistical breakdown)

We next must focus not on the practices of the L.A.P.D. but on the City Attorney's office and the Court. Again, the statistics speak for themselves. While the city attorney offered 94 percent of the females and 95 percent of the homosexual males a disposition of either 647(b) or 602(L) with 2 years probation, only 12 percent of the heterosexual males received such an offer. Instead the heterosexual males either received an offer of 415 (disturbing the peace) with 1 year probation or no probation, or they received an outright dismissal of the case. In contrast, only 3 percent of the females and 5 percent of the homosexual males received an offer of a 415 or a dismissal. We speak of an "offer" by the city attorney but these figures actually represent the actual order of the court in disposing of the case. However, the "offer" and the disposition are usually the same because the court merely "rubber stamps" the city attorney's final offer.

SENTENCES IMPOSED
(see statistical breakdown)

In Division 81 the conditions of probation usually associated with a violation of section 647(b) are:

1. Obey all laws.
2. Submit to and cooperate in field interrogation by any peace officer any time of the day or night.
3. Carry at all times a valid California driver's liscense or Department of Motor Vehicles Identification card containing your true name, age, current address, and shall display such identification upon request to any peace officer or officer of the court upon request and not use any other name for any purpose.
4. Not solicit or accept a ride from motorists or be parked in a motor vehicle with lone male motorists.
5. Not approach male pedestrians or motorists or engage them in conversation upon a public street or in a public place.
6. Not occupy a motel room unless registered in your true name.

Of the females arrested, 182 (90 percent) had conditions 1-6 imposed on them for a period of 2 years. Of the homosexual males arrested, 81 (94 percent) received conditions 1-6. No heterosexual males arrested received conditions 1-6.

Most of the persons arrested for violations of 647(b) received varying jail sentences. 163 of the women (80 percent) received from 5 days to 180 days in jail. Of the homosexual males arrested, 80 (94 percent) spent from 5 to 90 days in jail. Only 2 heterosexual males spent 5 days in jail.

STATISTICAL BREAKDOWN OF CASES FILED IN DIVISION 81, L.A. MUNICIPAL COURT DECEMBER, 1972 -- JANUARY, 1973

Total complaints filed, 647(b):	376	
Total reviewed:	304	
Percentage reviewed:	81%	
Categorization of Offender:		
Female:	205	68%
Homosexual Male:	86	28%
Heterosexual Male:	13*	4%
Total:	304	100%
Method of Enforcement:		
Plainclothes vice officer:	288	94%
Uniformed officer	13	5%
Formal citizen complaint:	3	1%
Total:	304	100%
Type of Offense (soliciting or engaging):		
Engaging:	8	3%
Soliciting:		97%
Newspaper ad:	7	
Telephone call:	2	
Direct conversation:	287	
Total:	304	100%
Disposition of case:		
Female:		
647(f)	2	1%
647(b)	64	31%
602(L)	130	63%
415	1	.5%
Not guilty	3	2%
Dismissal	5	2.5%
Total	205	100%
Homosexual male:		
647(b)	33	38%
602(L)	49	57%
415	3	3.5%
Not guilty	0	
Dismissal	1	1.5%
Total	86	100%

* includes 5 pimps (improperly charged under this section)

Disposition of case (cont.):

Heterosexual Male (not including 5 pimps):

647(b)	1	12%
602(L)	0	
415	5	63%
Dismissal	2	25%
Total	8	100%

Sentences imposed:

Female:

Conditions 1-6 of probation	182	90%
Jail sentences:	163	80%
5 days or less	101	
30 days or less	17	
45 days or less	14	
60 days or less	10	
90 days or less	16	
180 days or less	5	

Homosexual Male:

Conditions 1-6 of probation	81	94%
Jail sentences:	80	94%
5 days or less	54	
30 days or less	12	
45 days or less	4	
60 days or less	2	
90 days or less	8	
180 days or less	0	

Heterosexual Male (not incl. 5 pimps):

Conditions 1-6 of probation	0	0%
Jail sentences:	2	25%
5 days or less	2	
30 days or less	0	
45 days or less	0	
60 days or less	0	
90 days or less	0	
180 days or less	0	

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

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I

DISCRIMINATORY ENFORCEMENT OF THE LAW IS AVAILABLE AS A DEFENSE TO A CRIMINAL PROSECUTION

The case most frequently cited as being the origin of the defense of unconstitutionally discriminatory enforcement of the laws in preconviction criminal proceedings is Yick Wo v. Hopkins (1886), 118 U.S. 356. That case involved a municipal ordinance regulating public laundries, which the court found to be enforced in a manner which unjustly discriminated against persons of the Chinese nationality. After so finding, the court went on to state in relevant part (at page 374):

> "The facts shown establish an administration so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with their administration and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

Federal court cases have continued to recognize the viability of the defense and propriety of raising it on behalf of the accused. In Two Guys From Harrison-Allentown v. McGinley (1961), 366 U.S. 582, the appellant, a corporation operating a large discount store brought suit in Federal court to enjoin the allegedly discriminatory enforcement of the Sunday closing law. In affirming the district court's denial of injunctive relief, the Supreme Court assumed the availability of the defense of discriminatory enforcement at the criminal proceeding, and stated (at page 589):

> "...appellant contends that there is still pending prosecutions against its employees initiated as a result of the alleged discriminatory action. Since appellant's employees may defend against such 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."

1

2 The appellate courts of California have, since the handing down of

3 the opinion in Two Guys, given full recognition to the availability of

4 the defense of discriminatory enforcement in criminal prosecutions. In

5 People v. Gray (2nd Dist. 1967), 254 Cal.App.2d 256, 63 Cal.Rptr. 211, the

6 appellants had been charged with violations of a L.A. Municipal code section

7 prohibiting the posting of handbills on private property without the owner's

8 consent. In answering the appellant's argument that the ordinance had

9 been discriminatorily enforced against them, the court stated (at page 263):

10 "There is no particular need to review the somewhat inconsistent positions which have been taken by California appellate

11 tribunals with respect to the availability of discriminatory enforcement of a penal law as a defense to a criminal action...

12 We are quite satisfied that Two Guys From Harrison-Allentown v. McGinley (citations omitted), disposes of all arguments, per-

13 suasive or otherwise, to the contrary."

14

15 II

THE MOTION TO DISMISS IS A PROPER METHOD

16 OF RAISING THE DEFENSE OF DISCRIMINATORY ENFORCEMENT

17 The defense of discriminatory enforcement of a penal law is a method

18 of protecting the constitutional rights of the defendant and of society.

19 The court in People v. Gray, supra, in discussing the purpose of the defense,

20 likened it to the exclusionary rule (at page 266):

21 "Although no case which we have read says so in so many words, the recognition of discriminatory enforcement of a penal law as

22 as defense to a criminal action is one of the few means the individual citizen has to force public officials to do their

23 job properly. Perhaps one of the unarticulated reasons why discriminatory enforcement is recognized as a defense to a

24 criminal prosecution is pretty much the same as the basis for the rule excluding illegally obtained evidence. We refuse to

25 admit such evidence because we know of no other way to force law enforcement agencies to obey the law."

26

27 Similarly, in People v. Utica Daw's Drug Co. (1962) 255 N.Y.S.2d 128,

4 A.L.R.3d 393, 398 the New York court stated:

28

29 "The claim of discriminatory enforcement should not be treated as a defense to the criminal charge to be tried before the jury

30 and submitted to it for decision, but should be treated as an application to the court for a dismissal or quashing of the

31 prosecution upon constitutional grounds. Insofar as a question of fact may be involved, the court should take the evidence in

32

> the absence of the jury and should decide the question itself. If the court finds that there was intentional and purposeful discriminatior the court should quash the prosecution, not because the defendant is not guilty of the crime charged, but because <u>the court should not lend itself to a prosecution, the maintenance of which would violate the constitutional rights of the defendant</u>." (emphasis added)

In the very recent case of <u>United States</u> <u>v.</u> <u>Moses</u> (Sup.Ct.,D.C., 1972) _____U.S.L.W._____(a copy of which is attached hereto) the defendants had been charged with violating that section of the D.C. Code which prohibits soliciting for prostitution. In a motion to dismiss the defendants claimed that the section was being enforced by the D.C. Police Department in a discriminatory manner and therefore denying defendants equal protection of the laws. The court took testimony regarding police procedures and accepted statistical information into evidence. Judge Halleck wrote a sixty page opinion in which he finally held (at page 59), "Accordingly, the informations must be dismissed as irreparably tainted with the invidious discrimination of the selective enforcement which produced them."

III
THE DEFENDANT MUST SHOW BY A PREPONDERENCE OF THE EVIDENCE THAT THE STATUTE HAS BEEN ENFORCED IN A DISCRIMINATORY MANNER

The court in <u>People</u> <u>v.</u> <u>Gray</u>, <u>supra</u>, makes it exceedingly clear that to place a burden of proof upon the defendant greater than that of establishing the existence of a fact by a preponderence of the evidence is to virtually nullify the availability of the defense of discriminatory enforcement (254 Cal.App.2d at 256). In establishing preponderence as the burden of proof, the court gave substantial weight to the recognition of the practical problems a defendant may encounter in securing evidence of discriminatory enforcement. The court stated (at page 266):

"Relative convenience in gathering the facts pertaining to a

> particular defense is frequently decisive in allocating the burden of proof. There is no reason why this consideration should not also affect the quantum of evidence required to sustain that burden. Evidence of discriminatory enforcement usually lies buried in the consciences and files of the law enforcement agencies involved and must be ferreted out by the defendant."

Although the defendant must establish discriminatory enforcement by a preponderence of the evidence, the burden of going forward shifts to the prosecution when the defendant introduces enough evidence to establish a strong inference of discriminatory enforcement. If the prosecution fails to satisfactorily rebut this inference then the case must be dismissed. In the case of United States v. Steele (9th Cir., 1972) 461 F.2d 1148, 1152, the defendant created a "strong inference of discriminatory prosecution" by showing that six other individuals had committed the same offense without being prosecuted. The government refused to answer the allegation of discriminatory enforcement, relying on prosecutorial discretion. In dismissing the case the Court of Appeals stated, "That answer simply will not suffice in the circumstances of this case."

IV
THE COURT SHOULD ACCEPT STATISTICAL EVIDENCE, TAKE TESTIMONY RELATING TO POLICE PROCEDURES, AND TAKE JUDICIAL NOTICE OF COURT RECORDS.

The case of People v. Harris (1960), 182 Cal.App.2d Supp. 837, 5 Cal. Rptr. 852, discussed the admissability of certain kinds of evidence on the issue of discriminatory enforcement. In the lower court the defendant had offered certain evidence to show discriminatory enforcement of the gambling statutes on the basis of race. The court, on appeal, held that it was prejudicial error to reject the offered evidence and remanded the case with directions to accept the following evidence (at page 839): 1) Racial population figures and percentages in the City of Pasadena; 2) Record of Pasadena gambling arrests for 3 consecutive years, showing the comparative number of whites and negroes arrested; 3) Existence of gambling for years in 3 all white men's clubs, in which no arrests had ever been made; and 4) routine

police procedure as testified to by members of the police force. The court in Harris based its decision on both the Fourteenth Amendment of the United States Constitution and Article I Section 11 of the California Constitution which reads, "All laws of a general nature shall have a uniform operation."

In People v. Gray, supra, (at page 268) the court took judicial notice that between January and July 31, 1966, the dockets of the Municipal Court of the Los Angeles Judicial District showed only 2 prosecutions for violations of the statute in question, while evidence showed that numerous violations of the statute, many of which were observed by the police, had occurred within the year.

The court in People v. Utica Daw's Drug Co., supra, reversed the lower court because it refused to admit evidence of selective enforcement in establishing a denial of equal protection. The court stated (4 A.L.R.3d at 397), "The defendant is entitled to introduce evidence of non-enforcement as relevant evidence bearing upon that contention."

V
THE RIGID TEST OF YICK WO HAS BEEN RELAXED IN RECENT YEARS

Traditionally, before discriminatory enforcement would be held to violate the constitutional mandate of equal protection of the laws, the defendant must have alleged and proved either intentional discrimination or a policy and practice of unequal enforcement by the administering agency. In Snowden v. Hughes (1944), 321 U.S. 1, 8, an action at law for an alleged infringement of petitioner's civil rights in violation of the Fourteenth Amendment and certain federal statutes, the court stated:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

In People v. Maldonado (2nd Dist., 1966), 240 Cal.App.2d 812, 50 Cal.

Rptr. 45, the defendant was charged with a violation of Section 288a (oral copulation) and the court stated (at page 816):

> "In the absence of evidence that the authorities had or have a policy and practice of unfair and unequal law enforcement, the fact that some wrongdoers are proceeded against while others equally suspect are not, does not of itself, amount to illegal discrimination."

Equal protection is not just a limitation on the government, but rather is a constitutional right guaranteed to every person. Although no right is absolute and unconditional the courts must foster and protect the rights of individuals that are guaranteed by the constitutions of the United States or the Constitution of California. In People v. Pearce (2nd Dist., 1970), 8 Cal.App.3d 984, the defendant, claiming the defense of discriminatory enforcement of the law, was charged with possession of marijuana and sale of heroin. The Court of Appeal (at page 988) emphasized that the purpose of the Equal Protection Clause is to insure that "all persons under like circumstances shall be given equal protection in the enjoyment of personal and civil rights."

In finding violations of the mandate of equal protection, many modern cases (both state and federal) have focused on the discriminatory result even though the state action may have been lacking in a discriminatory purpose. In Smith v. Texas (1940) 311 U.S. 128, the United States Supreme Court recognized that the Equal Protection Clause can be violated by activity which is not deliberately or intentionally discriminatory. The petitioner in this case, a negro, claimed that members of his race were being excluded in the selection of grand juries. The state denied any intentional and systematic discrimination against negro jurors and claimed that failure to select negroes was because the commissioners in charge of selection were not personally acquainted with any members of that race. Giving the greatest possible weight to the state's evidence, the court concluded (at page 132):

> "Where jury commissioners limit those from whom the grand jurors

> are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously the convictio cannot stand."

The concept postulated in Smith was again reiterated by the Supreme Court in the case of Burton v. Wilmington Park Authority (1960), 365 U.S. 715, 725, "It is of no consolation to an individual denied equal protection of the laws that it was done in good faith."

In the area of equal housing the federal courts have also focused on the damage to the individual rather than the intentions of the state agency. In Banks v. Park (N.D.Ohio, 1972) 341 F. Supp.1175, it was charged that action by a city in revoking permits to a federally assisted housing project for construction in predominantly white areas, denied non-caucasians tenants equal protection of the laws. The court accepted this argument, although no showing was made that city officials intended or designed any discrimination. The court stated (at page 1180):

> "If proof of a civil right violation depends on an open statement by an official of intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. Therefore, in the absence of any supervening necessity or compelling governmental interest, any municipal action or inaction, overt, subtle, or concealed, which perpetuates or reasonably could perpetuate discrimination....cannot be tolerated." (emphasis added).

In another recent federal case, Norwalk Core v. Norwalk Redevelopment Agency (2nd Cir., 1968) 395 F.2d 920, 931, the court stated:

> "Equal protection of the laws means more than merely the absence of governmental action designed to discriminate;...we now firmly recognize that the arbitrary of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." (emphasis added)

These types of decisions have not been limited to non-criminal cases. In the case of City of Ashland v. Heck's Inc. (1966), 407 S.W.2d 421, a Kentucky Court of Appeals case, the plaintiff sought to enjoin the enforcement of a state criminal law on the grounds of discriminatory enforcement. In affirming the lower court's issuance of the injunction, the court stated (at pages 424-425):

"In fairness to the municipal officers who are engaged in this litigation, let it be understood that there is no suggestion of a dishonest or opprobrious motivation in their actions and policies. On the contrary, it is manifest that they are the innocent victims of a persisting legislative neglect, disinclination, or inability (whichever it may be) to come to grips with the problem -- indeed, the obligation -- of bringing a poor law into conformity with the facts of life. Nevertheless, 'the equal protection of the laws' ...is not qualified...it cannot be denied either in bad faith or in good faith."

Although in the present case the defendant will offer evidence of a discriminatory policy and discriminatory practices of the Los Angeles Police Department and the City Attorney's Office against females and homosexual males, defendant does not feel bound to prove a discriminatory intent on the part of these agencies. Rather, the court should focus on the discriminatory results which occur.

VI

SECTION 647(b) OF THE CALIFORNIA PENAL CODE IS BEING ENFORCED BY THE LOS ANGELES POLICE DEPARTMENT AND THE CITY ATTORNEY'S OFFICE IN A MANNER WHICH DEPRIVES FEMALES AND HOMOSEXUAL MALES EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 11 OF THE CALIFORNIA CONSTITUTION

It is the conscious and deliberate policy of the Los Angeles Police Department and the Los Angeles City Attorney's Office to enforce Section 647(b) against females and homosexual males, virtually neglecting the potential liability of male customers of female prostitutes. See "Enforcement of Section 647(b) of the California Penal Code by the Los Angeles Police Department", by Coleman, Wendt, and Schrader, March 27, 1973, a copy of which is attached hereto. That study reviewed the 647(b) arrests and complaints filed over a two month period (December, 1972 -- January, 1973) in Division 81 of the Los Angeles Municipal Court. That study is a summary of those cases and the court may take judicial notice of the report and the cases. A list of the cases is also attached for the court's convenience.

Over ninety-six (96%) percent of those arrested for violations of section 647(b) in the two month study were either females or arrested for homosexual offenses. Only slightly over two percent (2.6%) were male customers of female prostitutes. Pimps accounted for about 1.6% arrested.

About ninety-four (94%) of the arrests made were through the use of plainclothes vice officers, (see page 8 of "Enforcement). The researchers stated (at page 2 of the report), "We have collected the names of over 150 vice officers working within seven of the Divisions of the police department. These officers were employed in this capacity during the months of June through December, 1972. None of these officers are women."

It should also be noted that over ninety-seven (97%) of all arrests were for solicitations.

The defendant contends that the discrimination against females and homosexual males results both from intentional discrimination by individual officers enforcing the section and from the policies of the Los Angeles Police Department. Both the intentional discrimination and the policies of the department virtually exempt heterosexual males from liability for arrest and prosecution for violations of this statute.

The intentional discrimination is best illustrated by referring to page five of the "Enforcement" report. The report states:

> "In at least 4 of the cases reviewed, while both the man and the woman were caught by the officers engaging in prositution, only the woman was arrested. In one of these cases Officers Stovall and Ramsdale were on footpatrol in the Central Division (downtown L.A.) They observed 2 marines approach a woman on the street. They eventually met up with a second woman. The two men and the two women walked to a nearby motel while the officers followed. The two couples went to a room which was registered to the marines. The officers stationed themselves outside the door to listen. With their ears to the door, the officers overheard a solicitation. They obtained a pass key from the manager and entered the room. The officers observed each marine engaged in a sexual axt with a woman. The marines admitted to the officers that they had picked up the women and had paid them for sexual services. The officers arrested the women and let the men go free. One woman received 180 days in jail and the other received a sentence of 60 days."

There are at least 2 policies of the Los Angeles Police Department

which result in a discrimination against females and homosexual males. The first is the policy of dealing with prostitution by focusing on the prostitutes. Referring to page 1 of the "Enforcement" report, the researchers state, "Officer Spayth further emphasized that it is the current policy of the Department to place emphasis on arresting female prostitutes rather than their male customers." The second policy decision which results in a discrimination against females and homosexual males is the fact that only male vice officers are used to enforce section 647(b). Since 94 percent of all arrests are made with vice officers and since 97 percent of all arrests involve solicitation, and since the officers charged with enforcing this section are male, it is apparent that the police are not concerned with arresting heterosexual males (customers of female prostitutes). By definition, a heterosexual male will not solicit a male vice officer to have sexual relations with him for money. A heterosexual male would only solicit a female to commit such an act. If the Los Angeles Police Department were to employ female vice officers in the enforcement of Section 647(b) it would be possible to arrest heterosexual male violators.

In the case of *United States v. Moses, supra*, Judge Halleck recognized that a major portion of the discriminatory enforcement resulted from the policy of the Washington D.C. vice division of only using male decoys. The court stated (at page 44):

> "At the hearing upon these motions, Lieutenant Richards testified that the customary way of making prostitution arrests under 8 2701 involves the use of the police officer 'decoy', wearing plainclothes and using an unmarked car, who cruises and strolls areas known to be frequented by female prostitutes, and endeavors to be the recipient of a solicitation. As the Lieutenant's testimony confirms, all the officers composing the Prostitution, Perversion and Obscenity squad are male. Indeed, membership of that squad has been exclusively male. The Vice Squad of the Third Police District -- an autonomous unit unconnected with the Morals Division -- did essay an experiment *using policewomen as decoys* who, upon being solicited for prostitution by male 'johns', made arrests under 82701. The experiment ceased abruptly. Its demise had nothing to do with a dearth of arrestees; on the contrary, *the very success of the project signalled its end*. The outcry of 'respectable' gentlemen from the suburbs, sullied and embarrassed by their encounter with the law, soon reached the responsive ears of the police and the program was abandoned..."

The discriminatory policies and practices of the Los Angeles Police Department are shared by the City Attorney's Office in their discriminatory plea bargaining practices. See pages 6, 8, and 9 of the "Enforcement" report. The deliberate policies and practices of both the L.A.P.D. and the City Attorney's Office yield results which are quite consistent with their intent. Females and homosexual males are more frequently arrested, prosecuted, convicted, and incarcerated for soliciting or engaging in prostitution than are their heterosexual male counterparts. These enforcement practices are the natural result of a discriminatory intent; together they impose an invidious discrimination on females and homosexual males, thereby denying to these classes the equal protection of the laws which is guaranteed to them by the constitution.

A certain class of offenders is being deliberately and arbitrarily exempted from the operation of Section 647(b) to the detriment of those similarly situated. It is obvious that males can solicit females in the role of either buyer or seller of services. Kinsey estimates that about sixty-nine (69%) percent of the adult male population frequent prostitutes (Sexual Behavior in the Human Male, Kinsey, Pomeroy, & Martin, 1948, at page 597) while Benjamin and Masters estimate eighty (80%) percent (Prostitution and Morality, Harry Benjamin M.D. and R.E.L. Masters, 1964, at page 208).

A man who goes to an area frequented by prostitutes with the intent of meeting a female prostitute is as likely to violate Section 647(b) as is the female prostitute herself. Nevertheless, the L.A.Police concentrates all its efforts by the use of undercover men posing as potential customers of the female or homosexual male. However, the Los Angeles Police Department extends no efforts to apprehend the male customer of female prostitutes.

VII

DEFENDANT IS A MEMBER OF THE CLASS BEING DISCRIMINATED AGAINST BY THE LOS ANGELES POLICE DEPARTMENT AND THE CITY ATTORNEY'S OFFICE

The discriminatory enforcement practices of the Los Angeles Police Department and the City Attorney's Office can be analyzed from two different perspectives. Because females and homosexual males are much more frequently arrested, prosecuted, convicted, and incarcerated under Section 647(b) than are their heterosexual male counterparts, the result is an invidiously discriminatory punishment of those classes of persons. Defendant is and has been a publicly acknowledged homosexual since 1970. His status as such is known in the Los Angeles community because of his work with the gay community and because of publicity. See Los Angeles Times, "Unitarians OK Ministry to Homosexuals", April 1, 1973, Part V, Page 16. Because defendant falls into the class of persons being affirmatively discriminated against he is entitled to raise the defense of discriminatory enforcement of Section 647(b) as a basis for the dismissal of this action.

The other perspective reaches the same result. Because the Los Angeles Police Department virtually never enforces this section against (heterosexual) male customers of female prostitutes, and because the City Attorney's Office gives more desirable offers in the plea bargaining process to heterosexual males, a benefit is being conferred by the state upon that class. Because defendant is not a member of that class he does not receive that benefit (of immunity from prosecution or punishment). Therefore he is being discriminated against in a manner which denies him equal protection of the laws.

In addition, the defendant asks the court to take judicial notice of the fact that he is faced with a third trial of this case. If defendant were a heterosexual male he never would have been arrested in the first place or his case would have been dismissed before the first trial.

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2 VIII
UPON CREATING A STRONG INFERENCE OF DISCRIMINATORY
3 ENFORCEMENT, THE BURDEN IS ON THE GOVERNMENT TO
SHOW A COMPELLING STATE INTEREST TO JUSTIFY THE
4 DISCRIMINATION

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6 Once the defendant introduces sufficient evidence to create a strong
7 inference of discriminatory enforcement, the burden is then on the government
8 to justify it. United States v. Steele, supra, at p. 1152. In the present
9 case the burden is on the government to justify its selective enforcement
10 of section 647(b) against females and homosexual males, and its failure to
11 enforce the section against males (heterosexual) who are customers of
12 female prostitutes. As noted earlier, it is estimated that between 69
13 percent and 80 percent of the adult male population visits prostitutes
14 with varying frequency. And yet, in Los Angeles, only 8 persons out of
15 304 arrested (2.6%) over a 2 month period were customers of female pro-
16 stitutes. See "Enforcement" at page 8.
17 If Section 647(b) or its manner of enforcement either rests on
18 "suspect" classifications or infringes on a "fundamental" right the
19 government must show a "compelling state interest" in order to justify
20 the discrimination. Korematsu v. United States (1944), 323 U.S. 214, 216;
21 Shapiro v. Thompson (1969), 394 U.S. 618, 634;
22 Section 647(b) prohibits soliciting or engaging in prostitution. It
23 prohibits soliciting in public regardless of where the act will occur. It
24 prohibits solicitations in private as well. It prohibits "any lewd act" in
25 the privacy of a home. It prohibits " any lewd act" for money or other
26 consideration regardless of who the parties are: husband and wife, boyfriend
27 and girlfriend, gentleman and mistress, adult and minor, or any 2 consenting
28 adults. The Supreme Court of the United States has recognized that the
29 right of "procreation" was a fundamental human right guaranteed and
30 protected by the Constitution of the United States. Skinner v. Oklahoma
31 (1942), 316 U.S. 535. The California Supreme Court acknowledged that the
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individual has a constitutional right of privacy in "matters related to marriage, family, and sex." People v. Belous (1969), 71 Cal.2d 954, 80 Cal.Rptr. 354, 360. Because Section 647(b) is so very braod and does not distinguish between protected and unprotected activity it necessarily infringes on the fundamental right of "privacy" and free speech. Cf. Griswold v. Connecticut (1965) 381 U.S. 479; Eisenstadt v. Baird (1972), 405 U.S. 438; Stanley v. Georgia (1969)394 U.S. 557; Roe v. Wade (1973), 93 S.Ct. 705.

However, even if this statute did not infringe upon a fundamental right such as privacy or free speech the government would still have to meet the "compelling state interest" test because the discrimination in the enforcement of the statute is based upon '"suspect" classifications, i.e. sex or sexual orientation.

In dealing with classifications based upon sex, the United States Supreme Court has invalidated legislation involving such a classification denominating it, "the very kind of arbitrary legislative choice forbidden by equal protection". Reed v. Reed (1971), 404 U.S. 71, 75. In that case the court held that the classification did not even meet the less strick "rational relationship" test. The California Supreme Court has held that a classification based upon sex is "inherently suspect" in the case of Sail'er Inn v. Kirby (1971), 5 Cal.3d 1, 95 Cal.Rptr. 399. Therefore, the fact that the Los Angeles Police Department will arrest a female prostitute (and actively seeks them out) while it does not arrest the heterosexual male customer of female prostitutes (virtually exempting them from the operation of the statute) must be justified by a "compelling state interest".

In the case of Sail'er Inn, the court identified several characteristics of suspect classifications. 1) The characteristic frequently bears no relation to the ability to perform or contribute to society; 2) the class is relegated to an inferior legal status without regard to capabilities or characteristics of its individual members; and 3) the classification is

associated with the stigma of inferiority and second class citizenship. Using this approach, homosexuality (as a sexual orientation) would most definitely be a suspect classification. Although homosexuality per se is not a crime, homosexuals have been labeled as criminals for centuries. Homosexuals are often fired from their jobs if the employer discovers their sexual orientation. The government has refused to grant security clearances to homosexuals for decades. Aliens have been deported from the country because they were homosexual. Thousands of persons have been ostracized from their families because of their sexual orientation. Countless have been sent to mental institutions because of they committed a homosexual act or because they might commit such an act. In this day and age no other group or class of persons (based on sex, race, religion, alienage, or political affiliation) more fits the description of "suspect" classifications than do homosexuals. Several recent court decisions have begun to recognize the fact that there is no rational connection between a person's sexual orientation and their ability to contribute to society or to their employer. Cf. Morrison v. State Board of Education (1969) 1 Cal.3d 214; Norton v. Macy (1969) 417 F.2d 1161; Gayer v. Laird (1971) 332 F.Supp. 169. Therefore, in order for the government to justify its actively seeking out homosexual males and not heterosexual males it must demonstrate a "compelling state interest."

In addition to showing a "compelling state interest" in the continued discriminatory enforcement of Section 647(b) the government must show that there is not a "less onerous alternative" to the achievement of state objectives. Dean Milk v. City of Madison (1951), 340 U.S. 349.

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IX

THERE ARE NO STATE INTERESTS SUFFICIENTLY COMPELLING TO JUSTIFY THE DISCRIMINATORY ENFORCEMENT OF SECTION 647(b) BY THE LOS ANGELES POLICE DEPARTMENT & THE CITY ATTORNEY'S OFFICE

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7 Mere administrative inconvenience incidental to an attempt to enforce
8 section 647(b) with an even hand would not justify the discrimination
9 which presently exists, even if the less exacting "reasonable relationship"
10 test were employed. United States v. Moses, supra, at page 54; Cf. Reed v.
11 Reed, supra. A state agency may not justify a denial of equal protection
12 by arguing that the alternative would be to create a situation which might
13 require more work on the part of the administering agency. Williams v.
14 San Francisco Unified School District (N.D.Cal., 1972) 340 F. Supp. 445.
15 However, far from involving extraordinary efforts on the part of the Los
16 Angeles Police Department, even handed enforcement would be relatively easy
17 to accomplish. Just as male vice officers are now deployed to await solicita-
18 tions by females and homosexual males, female police officers could similarly
19 be used to attract solicitations from male patrons. The successful use of
20 this approach for a time in Washington D.C. attests to its feasibility.
21 See Moses at page 45.
22 Just as there is no insurmountable barrier to the even enforcement of
23 section 647(b) there appears to be no real practical advantage gained by
24 its discriminatory application. The general routine of police rounding up
25 prostitutes, "queers" and "drag queens" and putting them away for several
26 days, weeks or months, only to see them reappear on the atreet again when
27 they are released casts serious doubts that the governmental aim of
28 eradicating street solicitations is advanced at all by these discriminatory
29 practices.
30 If the police and prosecutors were really interested in eliminating
31 prostitution they would enforce the law against those who have the most to
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fear from an arrest and conviction, i.e. the heterosexual male customer. Most patrons of female prostitutes are shown to be white, middle-class, middle-aged men. See Moses, footnote 77, page 59. In his study, "Prostitution in Seattle", Washington State Bar News (August-September, 1971) at page 28, Dr. Jennifer James found that the average age of male customers was 30 to 60 years (69.6%) with the typical occupations of businessmen (35.0%), salesmen (10.6%), Boeing employees (13.8%), and lawyers and accountants (11.4%). As it stands now in Los Angeles, the heterosexual male customer runs very little risk of being arrested.

The continued existence of the institution of prostitution would seem to depend on the interaction of both supply and demand. A noted authority on the law's treatment of women has made the point succinctly, "The fact remains that the female prostitute could not exist without male customers." Leo Kanowitz, Women and the Law: The Unfinished Revolution, (1969) at page 17.

Unless the Los Angeles Police Department adopts a conscientious policy of enforcement of section 647(b) against heterosexual men who demand and pay for the services of female prostitutes, assumptions about the relative effeciency or inefficiency of even handed enforcement must remain mere speculation. As Judge Halleck in Moses, supra, concluded (at page 55):

> "It might well be discovered that a consistent and well publicized policy of arresting, prosecuting, convicting, and sentencing male customers (of female prostitutes) for soliciting prostitution would quickly eliminate solicitation and accomplish the givernment's alleged aim. The fact that adverse public response to the short lived experiment of the Third District Vice squad was apparently so forceful suggests that the average male customer could find the genuine threat of criminal prosecution a powerful deterrent. While the stakes may not be high for a woman who has already been stigmatized by arrest and conviction, and who has few alternatives in any event, the 'occasional' customer from the suburbs, with a job and a middle-class reputation to protect, stands to lose a great deal by exposure to the criminal process. A serious enforcement effort directed at the male customer, maintained even in the face of public outcry, could make seeking the services of a prostitute so dangerous an indulgence that the demand for such services would evaporate. Without a customer, the prostitute would have no reason to continue offering to supply the service."

The policies and practices of the Los Angeles Police Department and the City Attorney's Office in the enforcement of section 647(b) of the California Penal Code has resulted in an invidious discrimination against females and homosexual males. Where an invidious discrimination bears so little perceptible relation to the ends toward it is ostensibly directed, and where it seems that non-discriminatory application of the law would advance those ends with even greater efficiency, the discrimination cannot satisfy the requirement of a "reasonable relationship" between the end and the means, must less the more strict requirement of its necessity to some "compelling state interest".

For the foregoing reasons the defendant contends that he has been denied equal protection of the laws in violation of both the United States and California Constitutions and he therfore requests the court to dismiss the complaint against him, because it is irreparably tainted with the invidious discrimination of the selective enforcement which produced it.

X

THE LOS ANGELES POLICE DEPARTMENT HAS VIRTUALLY CREATED AN EXCEPTION TO SECTION 647(b) OF THE PENAL CODE IN VIOLATION OF ARTICLE III SECTION 1 AND ARTICLE IV SECTION 1 OF THE CALIFORNIA CONSTITUTION

The doctrine of separation of powers rests at the very foundation of our form of republican givernment. It was the basis of our federal government when founded, and was adopted as the basis for the government of the State of California. Article III S 1 of the California Constitution reads:

> "The powers of the state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by the Constitution."

Article IV S 1 of the California Constitution reads: "The legislative power of this state is vested in the California Legislature which consists of the Senate and Assembly."

In 1969 the California Legislature amended Section 647(b) of the Penal Code to read:

> "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
> b) who solicits or who engages in any act of prostitution. As used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration."

That section is still in effect and has not been amended or repealed by the California Legislature. There are currently bills pending in Sacramento which would, if adopted, repeal this section and replace it with another. However, until the Legislature does so, the present statute is still the law in California.

The Los Angeles Police Department has virtually created an exception to this statute, thereby exempting an entire class of persons from prosecution. See "Enforcement" by Coleman et. al. It should be noted that this statute does not distinguish between male or female offenders, between heterosexual or homosexual offenders.

Because of its policy and practice of not arresting heterosexual male

customers, in effect the Los Angeles Police Department has altered the scope of section 647(b) and it has "legislated" an exception to the statute. The Los Angeles Police Department is an administrative agency whose duty it is to execute the laws, not to change them. "Executive officers may not, by means of construction, rules and regulations, orders, or otherwise, extend, alter, repeal, or ordinarily set at naught or disregard laws enacted by the legislature." 16 Corpus Juris Secundum § 169. The court in Eisenberg's White House v. State Bd. of Equalization (1946) 72 Cal.App.2d 8 recognized this principle which is essential to a meaningful doctrine of separation of powers: "An administrative officer or body....may not make a rule or regulation altering....the terms of a legislative enactment."

Other jurisdictions have had experiences with executive officials who have encroached upon the power of the legislative branch. Because of the importance of the doctrine of separation of powers, it then becomes the obligation of the judiciary to intervene, to create a remedy, and to remind the executive branch of its limitations. The Court in Oklahoma once found itself in a very sensitive situation (even more sensitive than the present case before this court). Under the law of that state, in some situations the death penalty was mandatory. In such cases the governor was without power to intervene. However, the governor disagreed with the use of capital punishment. He therefore set aside the death penalty in all murder cases. In Henry v. State (1913) 136 P. 982 the trial judge had imposed the death penalty but the governor would not allow it to be carried out. Finally the Supreme Court of Oklahoma had to resolve the dispute:

> "If it be conceded that the Governor's position in correct, and that he has the right to suspend the execution of any provision of law of which he may not approve; and if it be true that other officials of the state are answerable to him, and not to the people -- then we have an empire in Oklahoma, and not a free state.....Concede the principle contended by the Governor, and where will the matter end? It would utterly demoralize the enforcement of the law in Oklahoma, and it would convert the state government into one of men and not of law." (at page 988)

The situation is really no different in principle in the present case. Although the "power to make changes in a criminal statute may not be delegated to an administrative officer" State v. Euclid Fish Co. (1964 Ohio App.) 198 N.E.2d 776, 778, and even though an equitable consideration will not entitle an executive officer to modify a statute, Chambers v. Lucas (1930), 41 F.2d 299,300, the Los Angeles Police Department has placed itself above the California Legislature and above the law and has created an exception to Section 647(b).

The case of Zayre of Georgia Inc. v. City of Atlanta (1967) 276 F. Supp. 982 draws a close analogy to the selective enforcement of the statute in this case. The statute involved in Zayre was a typical "Sunday closing law" which made it a misdemeanor to persue business on Sunday. The Atlanta Police Department was enforcing the law against some, while exempting others from prosecution. After citing McGowan v. State of Maryland (1961) 366 U.S. 420, and Two Guys, supra, the Federal District Court stated:

> "These cases also make it clear that a state can chose to create reasonable exceptions(emphasis in original), either by legislation or judicial action; however, this court is of the opinion that neither case stands for the proposition that municipalities may chose to carve out exceptions via selective enforcement of the state statute.....Thus, the court is of the opinion that, under the doctrine of Yick Wo v. Hopkins (citations omitted) and in view of the stipulated facts, it has no alternative but to issue an injunction ordering the defendants to enforce 26-6905 in a non-discriminaotry manner." (at page 894)

Seeking injunctive relief from a state or federal court is not the only remedy available to the defendant. Under the doctrine of Yick Wo, Two Guys, and other cases, this type of selective enforcement, or administrative legislating, can be the basis of a dismissal of the criminal proceedings.

Through its selective enforcement of section 647(b), the Los Angeles Police Department has violated the doctrine of separation of powers as enunciated in the California Constitution and has thus violated the rights of the defendant in this case. Therefore the defendant requests that the court dismiss the complaint in this case.

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BRYAN L. AMUNDSON Petitioner and Appellant, STATE BOARD OF EDUCATION of the State of California, Defendant and Respondent.	2nd Civil No. 37942 S. Ct. No. 989141

COURT OF APPEAL-SECOND DIST.
FILED
DEC 17 1971
CLAY ROBBINS, JR. Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Parks Stillwell, Judge. Reversed.

Andelson & Andelson and Arlen H. Andelson, for Petitioner and Appellant.

Evelle J. Younger, Attorney General; Thomas E. Warriner, Deputy Attorney General, for Defendant and Respondent.

This case involves proceedings by the State Department of Education to revoke the General Elementary Teaching Credential of Bryan L. Amundson ("petitioner").

On August 28, 1969, an accusation was filed