L.A. No. 30901

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DON BARRY PRYOR,	)
	)
Petitioner,	)
	)
vs.	)
	)
MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT,	)
	)
Respondent,	)
	)
and	)
	)
PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Real Party In Interest.	)
	)

BRIEF OF AMICUS CURIAE NATIONAL COMMITTEE FOR SEXUAL CIVIL LIBERTIES IN SUPPORT OF PETITIONER

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Introduction & Historical Background

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 (This was superseded by the present New York solicitation law in 1965.)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

were simply extending the common-law concept which underlay the offence of open lewdness. Open or public lewdness was an offence at common law, not because it was considered immoral -- and hence deserving of punishment -- but because indecent conduct occurring in public constituted a threat to public order. Had morality been its raison d'etre, the law would have punished lewd or indecent conduct wherever it occurred, whether in public or in private. Here, it is significant to note that there was no crime of fornication at common law, only adultery. And, since the latter was an offence against morality, it was punished wherever it took place, in public or in private, and, as a morals offence, it was cognizable originally in the ecclesiastical courts, not in the royal courts.

The Modern Period & Section 647(a)

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

> We cannot believe the Legislature intended to subject innocent bystanders, be they men, women or children, to the public blandishments of deviates so long as the offender was smart enough to say that the requested act was to be done in private. Nor do we feel the legislators were unaware of the open, flagrant and, to decent people, disgusting solicitations of sexual activity which have occurred on the public

> streets of some of our cities. Moreover, it is not to be forgotten that to some a homosexual proposition is inflammatory, which public utterance might well lead to a breach of the peace.[2]

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

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

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

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

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

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

offence is a clandestine one, and is almost invariably witnessed by only one person -- the arresting officer -- upon whose probity and integrity extraordinary reliance must perforce by placed. The UCLA Report stated:

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

This is not the place to discuss the opportunities for "shakedowns" and/or extortions to which such unsavory law-enforcement practices dispose.[8] The only point to be made is that the picture of homosexual solicitations limned by the court in Dudley, and on which its decision rested, is at odds with the facts. If protection against the alleged affront to public decency is the purpose of the solicitation portion of Section 647(a), then why is it necessary for almost all solicitation arrests to be police-initiated affairs? The UCLA investigators found "that communications from [private] citizens complaining about solicitations by homosexuals are rare."[9] In truth, this is an understatement. From the investigation and Report on the Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department conducted by Barry Copilow & Thomas F. Coleman, it would appear that complaints from members of the general public for conduct violative of Section 647(a) are virtually non-existent. Of the 662 arrests cited therein, 642 were made by plain-clothes policemen, 15 by uniformed officers, and only 5 involved complaints from private citizens, of which 2 were actually private security officers. The remaining three

complaints by private individuals were not for homosexual solicitations, but for lewd conduct of a heterosexual character.[10] In a follow-up study two years later by Chet R. Toy, the statistical breakdown showed a total of 29 arrests involving complaints, of which 22 involved homosexual conduct and 7 heterosexual. The complainants in all 22 homosexual cases were plain-clothes vice officers. Only three arrests of heterosexual offenders were made by plain-clothes police. Three other heterosexual arrests were made by uniformed policemen, and the seventh heterosexual case involved the lone complaint from a private citizen.[11]

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

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

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

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

The Import of the California Consenting Adults Statute

So far we have been discussing 647(a) in terms of the situation prior to the enactment of the California Consenting Adults Statute, the so-called Brown Act, which became effective on 1 January 1976.[14] It now becomes necessary to examine this section in the light of this legislation, which, among other things, legalized all private sexual conduct -- heterosexual and homosexual -- between consenting persons 18 years of age or above. The impact of this law is central to any consideration of the present validity of 647(a). Here it should be noted that, when

the Brown bill was under active consideration by the Legislature, lobbyists for the police, who opposed the measure, appeared before the legislative committees to which the bill had been referred in order to register their opposition. One of the principal arguments put forward by those police lobbyists in opposition to the bill was that the sodomy law reform which the measure proposed would undermine the legality of Section 647(a). One can admire the legal prescience of these police spokesmen whilst simultaneously wondering why they deemed the preservation of the solicitation provisions of 647(a) so vital. Were they unaware of the fact that more than one third of the states have either never had laws punishing simple, non-commercial sexual solicitations, or have repealed those they once had?

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

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

relations, are for conduct which is perfectly legal, unless, of course, either one of the parties is under the age of 18. This new law is in many ways inconsistent with, if not in direct conflict with, the rationale behind the solicitation portions of Section 647(a). For, if the enactment of the Brown Act means anything at all, it must, at the very least, represent official recognition by the state of California that continued punishment of homosexual conduct when it takes place in private constitutes a grave injustice to a significant segment of its citizenry, and that no legitimate state purpose is served by continuing to punish it. Even the most cursory perusal of the public reform movement which led to the ultimate passage of the Brown Act -- which extended over a period of some seven or eight years prior to its final enactment -- discloses that the intention of the reformers in campaigning for the Brown bill was to redress grievances that were common to both the then-existing sodomy law and Section 647(a). This was also the intention of legislators who voted for the bill's passage. Amongst the several grounds advanced for passing the Brown Act was the fact that then-existing penal law, which punished virtually all forms of homosexual conduct, was a source of numerous social evils, such as blackmail, extortion, and sadistic violence. A strong desire to reduce, if not to eliminate, these evils unquestionably entered into the considerations of those who fought for the Brown bill both outside and within the Legislature. Yet the existence of the solicitation portion of Section 647(a) stands as a direct invitation to the very blackmail, extortion, and violence, the eradication of which was one of the main reasons why the Brown Act was adopted.[17] To remove criminal sanctions from the conduct itself, yet to continue to punish solicitations to engage in the now-licit conduct, is not only a masterpiece of inconsistency, but provides the blackmailer, the extortionist, and those disposed to violence against homosexuals with a substitute vehicle for their operations. Under 647(a) the blackmailer or extortionist need only threaten to denounce his victim for "having propositioned" him, while the homosexual's assailant will justify his conduct, often

successfully, on the same grounds. It was never the intention of those who voted for the Brown bill to create such an anomaly and to allow its obvious purposes to be nullified by any provision in 647(a). Where, as here, there exist two statutes which are inconsistent, it has been a commonplace of our jurisprudence for courts to hold that the older of the two laws must yield to the more recent enactment for the evident reason that the public policy reflected in the newer enactment is presumed to represent the current intention of the Legislature and was meant to supersede anything inconsistent with it.

The Constitutional Issues

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

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

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

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

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

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

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

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

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

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

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

We come now to the second exception to the general

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

The matter is compounded by the fact that neither 647(a) itself nor the decisions under it provide the least guidance as to the meaning of "lewd" or "dissolute." The same must be said for its companion section, 647(d) of the same statute, which punishes anyone "who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act." Significant is the fact that, in none of the prosecutions involving solicitations for homosexual conduct under either 647(a) or 647(d) do the People appear to have attempted to prove that the solicitation, as distinct from the conduct solicited, was in fact "lewd" or "dissolute" or "lascivious." A reading of these cases suggests that the courts have simply proceeded on the assumption that the solicitation was lewd, dissolute, or lascivious, probably because the solicited conduct was then illegal. In some instances, the court expressly stated that, because the conduct solicited was illegal, it was,

ipso facto, lewd. In other cases this was not formally expressed.[27]

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

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

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

Reference has already been made to the inconsistency between 647(a) and the Brown Act. This inconsistency runs deeper than that already discussed for it involves something akin to due process or equal protection. Once homosexual conduct has been legalized by the state, due process would seem to require that the state afford a reasonable opportunity to all persons to communicate their desires to engage in the now-licit conduct, otherwise the newly-legalized area of conduct would, in large measure, be illusory. One does not meet consensual partners for any form of

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

lawful conduct as a matter of course. This means the right to employ reasonable means of communication to express the desire to engage in the lawful conduct, whether that communication be made in a public or in a private place.

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

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

But conceding that there will be those who will consider

Petitioner's solicitation to have been obscene, and thus without constitutional protection, this in no way destroys his right to challenge the constitutionality of Section 647(a). The Supreme Court's decisions in Lewis v. City of New Orleans, supra, and in Gooding v. Wilson, the case on which the Lewis decision was based, make this quite clear. Speaking for the court in Gooding, Mr. Justice Brennan declared:

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

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

conjunction makes the case for invalidity doubly strong. And where these defects involve a law penalizing speech, the reasons for striking it down are stronger yet. As the Supreme Court stated in 1963:

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

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

The second objection to this form of judicial salvage

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

solicitation law of such a character. At the very least, the decision whether or not to have such a statute should be made by the Legislature, not by this Court.

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

Is it not sufficient that the conduct is in any event punished should it actually take place in public?

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

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

(1) Ignore the section's clear mandate that the conduct solicited be "lewd" or "dissolute."

(2) Criminalize solicitations to engage in conduct that constitutes very minor offences, and thereby produce a statute unique in American jurisprudence.

(3) Raise a host of interpretative problems.

(4) Violate the constitutional rule which requires facially overbroad statutes involving First Amendment speech to be struck down in their entirety.

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

another person to engage in . . . deviate sexual intercourse.'"[37] This the court found violative of constitutional due process. Were the decision to have rested here, it would hold little relevance for the present case. But the People in Gibson requested the court to reconstrue "the statute so that it prohibits loitering only when the loitering is coupled with the overt act of solicitation."[38] Such a re-interpretation would have brought the statute closer to 647(a). It is the Colorado Supreme Court's response to this suggestion which is so pertinent here. The court refused to re-interpret the statute because "it would require" the "court to usurp a legislative function, and secondly, it would render the statute inconsistent with at least one other section of the Criminal Code."[39] Referring to the fact that deviate sexual conduct was no longer illegal in Colorado, the court pointed out that "the People's construction . . . would make it illegal to solicit another for a non-crime." Concluding, the court declared: "Because the People's construction would force us in effect to amend the statute, and because the construction would produce inconsistencies within the Code, we are obliged not to make this construction."[40]

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

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

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

> Even though the Columbus ordinance deals with invitations to engage in "sexual activity," the Constitutional problem is not solved in favor of the ordinance. Since sexual activity is illegal only

> under specific circumstances, and since the ordinance is not limited to illegal sexual activity, and since an invitation to sexual activity is not, necessarily, obscene, the ordinance is not limited by its own wording to "obscene" speech. Cohen v. California, 403 U.S. 15, 20 (1971); Miller v. California, 413 U.S. 15, Part II (1972); Eastman Kodak Co. v. Hendricks (1958), 262 F.2d 392.
>
> In the same way in which invitations to engage in sexual activity are not, necessarily, obscene, those invitations are not, necessarily, fighting words. In fact those invitations could easily be classified as loving words.
>
> This analysis would suggest that the ordinance is unconstitutional since it is not limited to fighting or obscene words.[44]

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

Sociological Epilogue

To discuss the legal infirmities of Section 647(a) without reference to the deleterious social consequences to which it and statutes like it conduce would be to discuss the law in vacuo. Though the National Committee for Sexual Civil Liberties does not claim to be knowledgeable regarding the matter of corruption within law-enforcement agencies in California, it can, based on data from other jurisdictions, state unequivocally that administration of sexual solicitation laws is frequently characterized by police entrapment and extortion. This is not to contend that, in all such instances, the conduct of the police was such as to constitute the legal offence of entrapment as defined in the jurisdiction involved. (These definitions differ substantially from state to state.) What is contended is that the police behavior, whether or not it actually constitutes legal entrapment, frequently amounts at the very least to enticement, and is of such a kind that any fair-minded person would question whether the nature of the offence warranted the employment of disreputable methods in its apprehension.[45] As for actual

extortion, what has frequently been said about the sodomy laws applies with equal force to the sexual solicitation laws. Both are grist for the mills of blackmailers and extortionists. Whitman Knapp, erstwhile chairman of the New York City Commission which investigated that city's police department a few years ago, stated publicly that "our laws dealing with such problems as gambling, the Sabbath, and sex are . . . an important source of [police] corruption."[46] In addition to constituting a standing invitation to police corruption, sexual solicitation laws on the order of 647(a) are open to capricious enforcement, permitting the police to use them for purposes of harassment, for satisfying personal grudges, or as a means of filling their monthly arrest quotas when the need arises.

No reference to the solicitation laws would be complete without reference to the robberies and "muggings" which they encourage on the part of certain elements of the population, some of whom are not otherwise criminal. Robbery and its kindred offence, blackmail, have always been the two crimes most closely associated with homosexuality. The homosexual is one of the most tempting preys of those who specialize in these crimes, since these criminals know that, in the vast majority of cases, their homosexual victims will never report the offences to the police. This is because the homosexual fears that, with the law being what it is, he will himself face criminal charges if he were to go to the authorities. The same is true in the case of "mugging." These unprovoked assaults on homosexuals are usually committed by young roughs, often working in gangs, who consider as fair game anyone suspected of being homosexual, even where there is no manifestation of homosexuality on the part of the victim. The merest suggestion of a homosexual proposal, real or fancied, is often sufficient to result in violence, and there are numerous occasions when the sexual proposal is actually induced by the mugger himself. There are also occasions when the victim is not homosexual. For reasons already indicated, the great majority of muggings of homosexuals go unreported and the mugger knows that he can commit his crime with virtual impunity. A study of one

hundred muggings in New York City, the results of which appeared in the New York Times, indicated that "at least 20% of the attacks studied were against chronic drunks or men seeking the company of prostitutes or homosexuals, victims who by their habits are unusually vulnerable to being mugged."[47] Since this study was confined to court cases, it was, by definition, limited to what had come to the attention of the authorities. Hence it involved only the visible fraction of the iceberg constituting homosexual mugging, for it is no exaggeration to state that, for every mugging of a homosexual which is brought to the attention of the authorities, at least four go unreported and undetected.[48]

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

> . . . the "homosexual" may become prey to the most unconscionable cruelty at the hands of oppressors who regard their sadism as righteousness. Physical violence and various forms of bodily assault upon

these people are common in our society and often result in murder. This violence frequently receives tacit approval, even at the official level, by the type of person who maintains . . . that "the only good queer is a dead queer." Indeed, "queer-baiting" has become a rather popular sport in some circles. The following instance -- one among many -- exemplifies the usual pattern:

> One spring evening . . . a young man stood waiting for a trolley near his home in San Francisco. His name was William P. Hall. He was a teacher by profession. . . . As he stood alone waiting for the streetcar that was to take him to a dinner engagement . . ., he [was] . . . surprised to see a car carrying four young men come to a precipitous halt beside him. Three of the young stalwarts descended from the car and approached him directly . . . . Nothing about the teacher is reported to have been particularly distinctive, let alone eccentric . . . one of the approaching gang called out bluntly to him, "Are you a queer?"
>
> . . . the teacher's reply was more educative than anger-provoking.
>
> "What if I asked you that question?"
>
> Those were the very last words spoken by William Hall. The three young hoodlums stormed the defenseless man and proceeded to beat him into a state of unconsciousness . . . . The police later reported . . . that Hall had been struck in the head by some weapon resembling a blackjack . . . . The boys removed from Hall's . . . body a wallet containing $2.85 and left their victim . . .
>
> He [Hall] met his death in this brutal fashion because a group of young toughs had presumed to diagnose him as a "homosexual" -- a "sex deviate," the officials called it in their report -- a "queer." The diagnosis was fatal for Hall, as the young vigilantes were out to cleanse the community of such filth. After having attacked . . . the teacher, they continued their prowl of the city in search of other "queers"; but finding no more people to assault and murder that night, they went home . . .
>
> In reporting the details of this atrocity, the <u>News Call Bulletin</u> thought it proper . . . to add that, "The [police] officers made clear Hall certainly was not . . ." a "sex deviate." . . .
>
> The young murderers certainly believed that their action was innocuous, if not virtuous. About this case inspector Robert McLellan commented to the

press, "They said they considered Hall's death justifiable homicide." He added, "They seem to regard the beating-up of whomever they consider sex deviates as a civil duty." . . .

The number of youths led to such criminality under the guise of decency is far from negligible. These young men admitted that the beating they gave Hall was not the first they had ever administered to a person whom they deemed to be [homosexual] . . . There had been many other such nights for this advanced guard of the puritan terror. When they left their friends that fateful evening they felt quite free to announce their intention of seeking prospective victims without the slightest fear of losing face. They said they knew of at least fifty other youths within the brief confines of their own neighborhood who participated in similar attacks upon "queers." . . . The News Call Bulletin reported that it had been affirmed by the young vigilantes that they "keep watch on establishments patronized by homosexuals, then track down the patrons as potential victims for attack." . . .

The young . . . are highly impressionable and become very easily conditioned by the unverbalized attitudes that impinge upon them from the environment . . . . These youths, like so many others, have gained the impression that assault and battery and even murder are justifiable if the object of one's hostility is homosexual . . . . In a society that condones legal oppression of the sexual nonconformist, and in which almost all morality has become equated with sexual morality, it is not surprising that the young should come to believe that any . . . form of brutality is . . . justified in the suppression and extermination of "the deviate." . . .

A youth goes out to hunt down a "queer" and, having found one and attacked him, then robs him of a couple of bucks. How different is this from the activities of a police force that, with the aid of cunning techniques, often entraps the "deviate" and then turns him over to a lawyer who makes a not unhandsome fee "defending" the culprit in a case of "sodomy" or "solicitation"?49

The same writer concluded:

. . . a growing number of young hoodlums in America make a practice of "queer-baiting," comfortable in the knowledge that so-called homosexuals will almost never call upon the police for protection and that they really cannot do so. . . . These youths take

> their cue from the laws and from the intolerant spirit that brings about and perpetuates such laws.[50]

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

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

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

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

The most charitable justification for this entire procedure is that the legislators who several generations ago passed the original laws from which 647(a) is descended knew nothing about homosexuality and conceived of the homosexual as a rara avis or sexual "freak," against whom the public had to be protected. They probably sincerely believed they were

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

A Final Note

Throughout these pages the discussion has been confined to the solicitation portion of Section 647(a). Yet the same section also includes the crime of engaging in "lewd or dissolute conduct," which is really a separate and distinct offence, and which, in most jurisdictions, is the subject of a separate statute, usually denominated "open" or "public indecency," or "open" or "public lewdness." Since Petitioner was not charged with engaging in lewd or dissolute conduct, this brief has deliberately eschewed discussing the engaging aspects of Section 647(a), although it is clear that some -- not all -- of the same infirmities which attach to the terms "lewd" and "dissolute" also apply to their use in connection with engaging. There might

also exist legal questions regarding the meaning of the terms "public place," a "place open to the public," and "exposed to public view." This brief ventures no opinion on any of these matters. They are mentioned here only because it is recognized that this Court may, for reasons of its own, come to the conclusion that all of Section 647(a) is defective -- its engaging portion as well as its soliciting portion -- and that therefore the entire section should be struck down. The same necessity would arise were this Court to conclude that these two portions are inseverable, so that overturning the solicitation part would automatically require overturning the engaging part.

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

a complaint, which is probably because it contains no solicitation provision and consequently requires more police effort in order to apprehend its violators.

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

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

Dated this 3rd day of April, 1978.

Arthur C. Warner

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Co-Chairman, National Committee for
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NOTES

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

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

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

4 Ibid., p. 699, note 84.

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

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

7 Pp. 694-695.

8 But see infra, pp. 24-30.

9 UCLA Report, p. 698, note 83.

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

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

12 Ibid., p. 6.

13 Infra, p. 10 et sec.

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

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

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

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

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

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

20 Ibid., at 4-5.

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

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

23 Ibid., at 138.

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

25 310 U.S. 296 (1940).

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

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

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

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

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

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

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

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

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

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

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

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

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

35 521 P.2d 774 (1974).

36 Ibid., at 774.

37 Ibid., at 775.

38 Ibid.

39 Ibid.

40 Ibid., at 776.

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

42 Ibid., at 859.

43 Ibid., at 860.

44 Ibid., at 861.

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

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

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

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

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

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

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

52 P. 698.

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

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

55 See supra, p. 6.

APPENDIX

Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department

Update: Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department

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

Investigation and Report Conducted By:

Barry Copilow, law student, U.S.C. Law School

and

Thomas Coleman, law student, Loyola Law School

REPORT AND INVESTIGATION OF ENFORCEMENT OF SECTION 647(a) OF THE CALIFORNIA PENAL CODE BY THE LOS ANGELES POLICE DEPARTMENT

This report contends that Section 647(a) of the California Penal Code is discriminatorily, invidiously, and arbitrarily enforced, and purposefully so, by the Los Angeles Police Department against homosexuals (hereafter referred to as gay persons) individually and against homosexuals as a class of persons (hereafter referred to as the gay community). This manner of enforcement allows for the worst kind of police malpractice, including falsification of arrest reports, harassment, and usurpation of the legislative and judicial functions of legal interpretation. It further establishes the machinery for cruel and unusual treatment of gay persons in the State of California.

Our methods were simple. We went through all misdemeanor complaint records in the office of the Clerk of the Los Angeles Municipal Court, Central Division. Records are kept for all complaints filed arising out of arrests in several divisions of the Los Angeles Police Department (including: Central, Rampart, Newton, Hollywood, 77th, Northeast, Southwest, Hollenbeck, Wilshire). We selected only those cases in which a complaint was filed for an alleged violation of 647(a). We then read every arrest report (made out by each arresting officer) for the months of June, July, August, and September, 1972, collecting data from the reports and categorizing them as follows:

1. Name of arrestee -- date of arrest
2. Place of arrest
   (a) bar
   (b) restroom

1) in a bar
2) in a public park
3) in a department store
4) in a movie theatre
5) elsewhere

(c) on the street
1) in or near a park
2) near a bar
3) in a car
4) elsewhere

(d) movie theatre

(e) elsewhere

3. Arresting officer
(a) name
(b) division
(c) frequency and similarity of arrest records

4. Nature of offense
(a) solicitation
(b) engaging in "lewd conduct"
(c) lewd conduct in concert with prostitution
(d) heterosexual type
(e) auto-erotic type
(f) homosexual type

5. Gender of offender

6. Complaining witness
(a) citizen
(b) uniformed officer
(c) plain clothes vice officer

7. Disposition of case
(a) type of plea
(b) dismissals
(c) plea bargain
(d) sentence imposed
(e) conditions of probation imposed

Particular cases of interest or points underscoring the theory of discriminatory enforcement will be noted as the data are broken down.

The total number of complaints filed for alleged violations of 647(a) for the 4-month study period was 781 or approximately 200 per month. Of these, 663 (approximately 85%) were reviewed. The remaining 15% were unavailable from the Clerk's office either because some cases are still pending and the complaints were with the trial court, or for some other reason were in transition.

A FEW BRIEF INTRODUCTORY NOTES:

1. There was no identifiable racial pattern in terms of officer versus defendant, although Blacks and Chicanos were in greater proportion than their average number in the population. This was apparently because most of the vice arrests occurred in older downtown areas (Main Street, Pershing Square, or McArthur Park) frequented mainly by these 2 groups.

2. Conversation with Officer Spayth, Public Relations of the L.A.P.D. by Tom Coleman on 12-11-72. Officer Spayth indicated that each police division utilizes its own vice detail, although major policy decisions (shall prostitutes alone or shall prostitutes and their customers be arrested; the number of women versus men operating on the vice detail and how they are used) are made exclusively by Chief Davis. Current policy is to arrest only the prostitute and not the customer as is evidenced by the lack of any female officers working vice detail in any area outside of advertising vice or pornography. In certain situations however, involving public sexual conduct, customers have been arrested. There is also an administrative vice

unit which has authority to patrol any part of the city of Los Angeles. The average length of duty on vice detail is 18 months, handling such diverse areas as gambling, A.B.C. violations, prostitution, lewd conduct, or "homosexuality." ("Homosexuality" was Officer Spayth's words, not ours. Homosexuality, per se, is nowhere made a crime in the California penal codes or Los Angeles municipal codes. It should be noted that there are types of homosexual conduct which are not illegal.) The amount of time spent on each area depends on current policy, for example, gambling may be handled during the daylight hours, while the "fruit details" generally operate at night (again, "fruit details" are Officer Spayth's words, not ours).

3. In a conversation with Tom Coleman on 12-11-72 Officers Healy of Rampart Division, Rimbald of Hollywood, and Madris of Central each indicated that no women are employed in their vice details.

4. In view of the fact that the Chief of Police is responsible for the major policy decisions of the vice squads, it should be briefly reflected here that on Nov. 22, 1971, in a letter to Councilman Arthur Snyder, Chief Davis referred to homosexuals as "lepers" (see letter attached); on June 28, 1970 he equated homosexuality with criminality; while in an interview with stations KPPC (radio) and KNBC (tv) the Chief called homosexuality a "spreading disease" (references attached).

5. There is considerable evidence of the L.A.P.D.'s <u>preoccupation</u> with homosexuality both as a crime and as the locus of a moral issue. In statewide hearings recently held on adoption of a revised penal code, the L.A.P.D. took a position on <u>only one</u> issue, homosexual conduct! Commander Devin's comments before

the Joint Legislative Committee for Revision of the Penal Code are attached hereto.

PLACE OF ARREST: (see data on "place of arrest")

As noted previously, the major focal points of arrests for 647(a) encompassed the older downtown L.A. areas (Main St., Pershing Square, and McArthur Park), with pockets of arrests occurring in Hollywood, the Silverlake-Echo Park areas, Arroyo Seco and Lincoln Parks in the northeast area, truck stops near 14th and Long Beach Blvd., South Park on 51st and Towne Sts., and at Hollenbeck Park in East L.A.

Of major interest was the apparently arbitrary and sporadic "heat" generated in a particular location at a given time. For example, in two 3-day periods in September (5, 6, and 7th; 18, 19, 20th) over 2 dozen lewd conduct arrests occurred at the Greyhound Bus Station restroom in Hollywood, most by the same vice officers, Slack and Morrett. Only 2 other arrests occurred there during the rest of that month. In June, 33 arrests occurred in the McArthur Park restrooms, all by officers Tanner and Cleary of Rampart Vice, while August showed only 7 arrests in that park (Officer Tanner had mononucleosis in August. Unless one assumes that the largest figures are representative of the actual numbers of violations occurring at any given time, it becomes difficult to avoid the conclusion that the arresting officers are acting in an arbitrary manner with a greater interest in the numbers arrested than in the legitimacy of the arrest.

As the data above indicate, the great majority of arrests occurred in public restrooms, almost 38 percent. Next greatest were the street arrests followed closely by those occurring in movie theatres.

Both the restroom and movie house arrest reports were conspicuous by their internal similarities. The "john" arrest reports would generally read as follows:

"Officers went to such and such a location because of numerous complaints of homosexual activity in the vicinity." (Note: not one arrest report of the 663 read which involved a public restroom has the name or indicated the presence of a complaining witness.)

"Upon entering the restroom the officer noted so many stalls and urinals.

"Defendant either sat on a commode or stood by the urinal masturbating his exposed, erect penis in plain view of any person who might enter the restroom."

Officer Gil of the Rampart Division had 5 differing arrest reports in July where the alleged offense occurred in a restroom, occurring on different days, all reading identically, except for a few words changed around. Several arrest reports of violations occurring in McArthur Park and Pershing Square had Xeroxed copies of the layout of the washroom facility attached to them with only the position of the defendant changed.

The movie theatre arrests inevitably were males "masturbating their exposed, erect penises" while watching a movie. The officers (mainly officers Barrera, Plouffe, and Paniccia of the Central Division) either "took positions at the rear of the theatre, or in the balcony," where "my attention was drawn to movement occurring in such and such a row." (One enlightened officer with "20-20 hearing" claimed he happened upon the defendant by hearing a zipper being pulled down.)

The street arrests were both numerous and varied, although these too contained a perceptible leitmotif,

always the defendant spoke first:

Deft.: "Hi, how are you?"
Offcr.: "Pretty lonely."
Deft.: "What are you looking for?"
Offcr.: "Just walking around."
Deft.: "I could make life more pleasant for you."
Offcr.: "What would you like to do?"
Deft.: "I could take care of you. I do __ __ __. Would you like to __ __ __ __ __?"

The end of the conversation usually depended upon the arresting officer's state of mind. Generally Officer Paniccia's arrest reports indicated the defendant wanted to "fuck him" while Officer Barrera's reports usually indicated that the defendant asked the officer to be the active partner in anal intercourse.

Occasionally, the arrests classified as "street" in nature involved overt sexual conduct and those followed the pattern thusly:

> "The officers approached the vehicle after seeing the head of one defendant disappear from view. Upon reaching the vehicle the officer observed deft. #1 attempting to conceal his exposed erect penis by zipping his pants, while deft. #2 was raising his head while attempting to wipe what appeared to be a creamy substance from his lips." (Note: all this occurred normally in a 20 second span of time.)

None of this is to say that all of the street arrests or reports were identical. Some were quite unique and enlightening. In one case involving an alleged female prostitute and her pickup, the police followed them from the point of contact in a car to a small bar-cafe in Central Los Angeles. Upon entering the back room, they

observed the couple engaging in sexual intercourse. Although charged with a 647(a) misdemeanor, the "trick" obtained a disposition of 415, disturbing the peace with 6 months probation and no conditions. Were that couple both males, a 286 felony sodomy charge would inhere, with a likely psychiatric evaluation and possible placement in a state prison or mental institution.

Also notable in the street arrests was the concentration on male defendants dressed in female attire, "drag queens." One officer, Sprankle, of the Wilshire Division had a habit of following the cars in which alleged "drags" would hitchhike rides into Hollywood, and his arrest reports read much like those of the "disappearing head" variet. Drag queens are particularly subject to harassment and their attempts to avoid prosecution are often to no avail. One technique employed by many drag queens and prostitutes, noted in at least 5 different reports, involved asking the arresting police officer if he was a policeman. The reply was always "no." The arrestee would then declare, "Prove it then by showing me your cock." Sometimes the officer would arrest the defendant merely for this statement. Since it is legally questionable whether a mere statement of this nature is sufficient to constitute a violation of 647(a) these arrests were sometimes dismissed at the arraignment. However, it should be remembered that the arrest record will follow the defendant around for the rest of his life.

Other street arrests occurred in public parks (not in the restrooms); these always involved solicitation of a vice officer save one instance in Lafayette Park, where 2 young gay males were arrested for "kissing and holding hands" which "disgusted" women and children nearby. This certainly demonstrates how vague "lewd conduct" is and how police discretion can be abused in interpreting this statute.

The truck stop arrests were only included in the data breakdown to indicate the lengths to which the vice squads often go in order to fulfill their legal obligations. It may be argued that sexual conduct is indefensible when occurring in a restroom, movie theatre, or on a street in potential plain view of the public. But the truck stops are self contained areas and semi-isolated locales, where no one other than those aware of the nature of the area venture. It is to say the least, hardly a place frequented by women and children.

The bar arrests, subject of the instant "Black Pipe" case, were intriguing in their diversity. We read of only 50 such arrests over the 4 month study-period (exclusive of the 21 occurring at the Black Pipe Bar). If there was a single unifying pattern to those "busts," it was that 90 PERCENT OCCURRED IN GAY BARS, often in widely divergent areas of the city. In no instance were the arresting officers in uniform.

In a series of nude dancing arrests in June, 1972 the defendants were charged with both 647(a) and 311.2 despite the fact that cases such as In Re Giannini (1968) 69C2d563, 567 have stated that it was not the intent of the legislature to include nude dancing in the parview of 647(a). This again demonstrates the vagueness of 647(a) and how police discretion can be abused. Incidentally, Judge George Trammell III accompanied vice officers on many of the nude bar "raids," and in fact was the judge sitting at one of those cases (defendant was acquitted).

Generally, the bar confrontations occurred over long periods of time, with lengthy conversations between officers and arrestees. In one case, 2 men were

arrested for kissing in a bar, which, according to the arresting officers, caused one patron to walk out in disgust. (These were the same officers, Tanner and Cleary, who had also arrested the 2 young men in Lafayette Park for kissing. The bar incidentally, was a gay bar.) In no case were a man and a woman ever arrested for kissing. This again demonstrates how vague 647(a) is and how police discretion can be abused.

Of the non-gay bar arrests (the few that there were), one involved a heterosexual male who inexplicably rushed the dance floor and kissed the gyrating buttocks of a female dancer. He was arrested for 647(a) but ultimately received a 415 disposition. Another involved 2 intoxicated women who fondled the "privates" of a male patron (the patron was not the complaining witness). One of these cases was dismissed, while the other woman received a 647(f) (drunk) disposition. The last "straight" arrest was that of a bottomless dancer who placed her index finger in her vaginal cavity while dancing. She was found guilty of disturbing the peace with no conditions of probation.

One gay nude dancer was arrested on a 647(a) charge because, the complaint alleged, he had an erect penis while performing. He was found not guilty at a court trial.

SOLICITATION ARRESTS: (see data on solicitation arrests)

We codified the nature of the offense since 647(a) really contains 2 distinct possible types of offenses: solicitation or engaging in lewd conduct. Since there is no place on either the arrest report or the complaint in which it is evident whether the defendant is being charged with solicitation or actually engaging

in lewd conduct it was necessary to read every police report in detail to collect this data. We were also careful to read those reports very carefully since solicitation is a form of speech and subject not only to preferred First Amendment protections but also subject to broad interpretation. Hence, we shall discuss the violations that occurred and the patterns that emerged.

It is seen from the data that of the total 663 arrest reports reviewed, 166 or about 1/4 involved solicitation. Of these only 6 involved females -- all prostitutes. None involved a private citizen complaint, or conversely, all were the result of police decoy techniques. In general, the solicitation arrests followed the pattern described previously in the dialogue between officer and defendant.

The few variations that occurred were the result of protracted conversations; one case, in fact, involved a vice officer making contact with an arrestee at a bus stop, later going to a bar (where the arrestee indicated for the officer to meet him), and once in the bar having a few drinks before the officer identified himself and formally charged the man with lewd conduct. Another involved an A.B.C. officer, Investigator Davis, purchasing a drink for the defendant and carrying on a 10 to 15 minute conversation before the arrest.

An interesting aspect of the solicitation arrests was the officer's interpretation of the "offer" made by the defendant. It is general policy for the arresting officer to explain in "legalese" what the defendant means when street language is used. On three different occasions, Officers Plouffe and Paniccia from Central and Officer Sprankle from Wilshire vice, interpreted an offer of "Do you want to have sex?" as homosexual street talk for "anal intercourse." It should be noted that in order for a solicitation to be a violation of 647(a) it must be a solicitation to commit a lewd act.

There are forms of homosexual conduct in private which are not violations of thepenal law. It therefore becomes important for the officer to determine exactly what form of sexual conduct the defendant wishes to engage in. Any solicitation to commit a sex act is not necessarily a violation of 647(a). This again demonstrates how much discretion the police have in enforcing this statute and just how that discretion can be abused.

It should also be noted that since the L.A.P.D. has a policy of only using male officers for the "sex detail" it is impossible for a heterosexual male to be arrested for solicitation of a vice officer. Because of this policy of only using male decoys, the police have effectively created an exception to the solicitation portion of 647(a). It should be emphasized that 647(a) prohibits all solicitation for lewd conduct, both heterosexual and homosexual. The police department purposefully avoids enforcing the solicitation portion against heterosexual males.

In doing our research we had to filter out the 314.1, "indecent exposure" cases from the 647(a)s and made some interesting findings. In all of the 314.1s not involving nude dancing, there was a private citizen complaint that prompted police action. As noted prior, not a single citizen ever complained of being "victimized" by a homosexual solicitation.[1] Thus, citizens will respond when their sensibilities are outraged or their morality offended by public displays. (See Note 1, below)

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[1] It is helpful to distinguish between police and citizen complaints. In a police initiated complaint the standard language is "Investigation due to many citizen complaints," but the arresting officer is really the complainant. A citizen complaint, alternatively, is where there is a private (non-officer) witness whose name appears on the face of the police report or complaint and who testifies to what he or she has observed. Usually the citizen will sign the complaint or report, stating that he or she is the complainant.

ENGAGING IN LEWD CONDUCT: (see data on "engaging")

Engaging in lewd conduct was far and away the most charged offense, comprising over 75% of the 647(a) arrests. As with solicitations, the pattern of arrest reports for engaging was very similar to that discussed above for restroom violations. We have already mentioned the several aberrations observed in the arrest reports involving variant types of behavior such as kissing, alleged oral copulation, and fondling. However, it should be noted that by far the largest number of arrests for this activity concerned auto-erotic behavior: masturbation, self-fondling, or suggestive bodily movements. Often, the only other males present were the arresting officers. Although again, the GREAT MAJORITY OF ARRESTEES WERE HOMOSEXUALS[2], there were isolated incidents of apparently heterosexual lewd conduct. These generally involved "tricks" of streetwalking prostitutes, one heterosexual couple who were seen engaging in oral copulation on a balcony, one couple engaged in public fondling, and several males urinating in public.

On an overall basis, of the 663 reports studied, ONLY 17 ARRESTS INVOLVED UNQUESTIONABLY HETEROSEXUAL CONDUCT, only 2.5 percent. It should be noted that according to even the most generous figures offered by scientists and researchers our population has a make-up of only 4 to 8 percent homosexuals, with over 90 percent heterosexual. It is therefore stunning to find that of those arrested for 647(a) only 2.5 percent were engaged in heterosexual conduct. It leads to the conclusion that the police do not actively seek out heterosexual offenses but only arrest the most obvious violations, that they fail to consider many public displays of heterosexual affection

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[2] It may be argued that those arrested in restrooms are not necessarily homosexual. However, Tom Coleman, co-author of this report, while interviewing 647(a) arrestees in custody at Division 81, asserts that the overwhelming majority of them arrested in restrooms acknowledged

(kissing, embracing, dancing, fondling, petting) "lewd" and hence do not arrest the couple, but that they actively seek out occurrences of homosexual behavior (including kissing, embracing, and dancing).

COMPLAINING WITNESS: (see data on complaining witness)

We have dealt previously with the fact of the dearth of private citizen complaints. As the data above indicate, only 20 of the 663 arrests were effectuated by persons other than plain clothes vice officers.

2 of the 5 citizen complaints involved a security officer at Bullocks downtown. On one occasion he observed a lone male in the store's restroom engaging in lewd conduct. On the other occasion the arrest pertained to indecency (holding his exposed penis) on the main floor of the store. The other 3 citizen complaints involved heterosexuals (the couple orally copulating on the balcony and a man waving his penis around in a liquor store).

Of the 15 uniformed-officer arrests, all but 2 occurred on Main Street, either in a movie theatre or a gay bar; the remaining 2 were arrested by Hollywood patrolmen who allegedly witnessed a lewd conduct violation occurring in an automobile.

Finally, in analyzing the "decoy" arrests (those propogated by a plainclothes officer), it should be reasserted that inevitably the arrest report shows the arresting officer as the passive party -- he supposedly never initiates a conversation or makes a furtive gesture indicating his willingness to partake in illicit activities. There are a few points that can be noted in response to this, besides the obvious one of the officer's constant non-involvement:

1. When asked if he is a police officer, the reply is always "no." Does one lie suggest any others?

2. In movie theatres, the officer actively seeks out males who may be engaging in lewd conduct, usually from the balcony or projection booth overlooking the main floor.

3. Barry Copilow, co-author of this study has spent the past 12 months as the legal services director of the Gay Community Services Center, and claims that approximately 8 out of every 10 persons who came in for legal assistance on a 647(a) charge stated that the police officer, and not the defendant initiated the conversation. None, however, ever claimed that an officer actually engaged in any lewd conduct.

GENDER OF OFFENDERS: (see data on "gender")

Of the total 663 arrest reports reviewed, only 17 defendants were female. However, the presence of these women among those arrested is easily explainable: 12 were actually prostitutes; 1 was a masseuse who began masturbating the naked officer; 1 was a nude dancer who went too far with her dance; 2 were rather drunk and fondled a customer in a bar (who was not the complaining witness).

This, of course, suggests that 647(a) is selectively enforced against males (homosexual) and some females (mostly prostitutes).

DISPOSITION OF CASES:

Although dispositions of cases may not in a strict sense be considered pertinent to this study, we are compelled by obvious double standard dispositions to include a discussion of them herein.

The data show that the vast majority of cases are disposed of through the use of the 602-L (trespassing) statute which allows imposition of a 2-year probationary period. Most homosexual offenders receive a 602-L disposition with 2 years summary probation and some severe conditions of probation. However, only 3 of the heterosexual cases merited a 602-L plea bargain. All other "straight" offenders received 415s (with 1 year probation or less and no conditions of probation), 647b (for prostitutes: note: the trick of a prostitute will not receive a 647b but will get a 415 or an outright dismissal), 647(f), or dismissals. This is freely admitted by David Ogden, City Attorney at Division 81, who claims that the double standard is a product of increased pressure from judges and attorneys who can "empathize" with the occasional aberrant behavior of "normal" defendants, but feel constrained by their own lack of understanding, police pressure, and internal revulsion to give the more severe 602-L to a homosexual.

In no instance did a heterosexual have to plea "straight up" to a 647(a). However, 67 homosexual defendants were convicted of 647(a). Those defendants must register as sex offenders (under 290 of the Penal Code) for the remainder of their lives.

It would normally seem rational that the severity of the offensive conduct would directly affect the disposition of the case. A solicitation violation is hardly a shock to thepublic conscience, whereas actually engaging in lewd conduct in public might bring a more severe reprimand. This is never the case! In fact while many homosexual solicitors are given jail time, 602-L dispositions, 2 years summary probation, and severe conditions of probation, the most blatant heterosexual violations

of the statute (sexual intercourse in a cafe-bar, kissing a dancer's buttocks, and orally copulating in an automobile), the ultimate disposition was a 415 or an outright dismissal.

A few other notes:

1. Indecent exposure violators and customers of prostitutes generally receive 415s with 1 yr. probasion or less, and no conditions of probation.

2. The homosexual offender is always asked if he works in a security related job or teaches. If the answer is yes, his employer is notified.

3. In the one 647A (child molestation) case studied, a 415 was the result (this was heterosexual conduct).

4. In nearly 2 identical cases involving prostitution -- the customer of a female (heterosexual lewd conduct) received a 415 and 1 year's probation, while the customer of a gay hustler received a 415 and 2 years' probation.

5. Gay people often receive conditions of probation prohibiting them from going into public parks or from congregating with other known homosexuals. Never has a "straight" 647(a) offender been told not to congregate with known heterosexuals.

Homosexuals are subject to constant probation violation proceedings since they rarely have any place to go but with their own kind, and after a time get to be known by the foot patrol or vice officers in certain areas. It becomes very much like a stigma that recreates a status crime every time one steps out onto the street.

These obvious inequities at the judicial level lend credence to homosexual complaints that they are the victims of standards that all too often allow for discrimination at every level of law enforcement.

STATISTICAL BREAKDOWN

Information:	June	July	August	September	Total
Place of Arrest:					
Parks (not in "john")	4	14	7	7	32
Bars	25	10	9*	6	50
Streets	53	34	48	61	196
Movies	25	40	29	40	134
Restrooms	69	54	56	71	250
Truck Stop	-0-	2	4	5	11

(* not including the "Blackpipe 21" cases)

Type of Offense:					
Solicitation (Homosexual)	52	33	34	47	166
Engaging (Homosexual)	122	126	115	140	503
Heterosexual type	4	2	6	5	17

Note: A few complaints involves both soliciting & engaging.

Gender of Offender:					
Male	163	155	143	185	646
Female	4	3	6	4	17
Complaining Witness:					
Citizen	2	3	-0-	-0-	5
Uniformed Officer	2	5	5	3	15
Plain Clothes officer	163	150	144	185	642
Disposition:					
Not guilty	4	1	-0-	1	6
Dismissed	12	7	1	10	30
Guilty: 602-L	108	111	112	143	474
415	10	7	10	8	35
647(a)	22	17	13	15	67
647(b)	5	4	7	1	17
647(f)	2	0	1	3	6

UPDATE:
ENFORCEMENT OF SECTION 647(a) OF THE CALIFORNIA PENAL CODE BY THE LOS ANGELES POLICE DEPARTMENT

July 19, 1974

by: Chet R. Toy

I N D E X

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Methodology:

Research was done by Chet R. Toy, student at California State University, at Long Beach. He compiled a list of all 647(a) complaints filed in the Los Angeles Municipal Court, West Los Angeles Branch, for the months of January through April, 1974. The Clerk of that Court had his deputies remove from the files of the Clerk all complaints and arrest reports for those months for 647(a) P.C. which were available. Mr. Toy then read all those complaints and arrest reports and compiled the following data on each case:

1. Case number
2. Gender of Defendant
3. Date of Arrest
4. Arresting officers name and serial number
5. Division of L.A.P.D. involved
6. Complaining witness:
   a) private citizen
   b) uniformed officer
   c) plainclothes vice
7. Place of arrest:
   a) bar
   b) street
   c) car
   d) park
   e) restroom
   f) theatre
   g) other
8. Nature of offense
   a) solicitation
      1) homosexual type
      2) heterosexual type
   b) engaging in conduct
      1) homosexual type
      2) heterosexual type
9. Disposition of case

A list of case numbers and a breakdown of those cases according to month is listed on the following page. The total number of cases filed with the Court for 647(a) arrests for the months included in this study was 38. Nine (9) of those complaints and arrest reports were not available in the clerk's office, and therefore were not included in the results of this study. A total of 29 cases were reviewed.

COMPLAINTS FILED FOR VIOLATION OF SECTION 647(a) P.C. WITH THE
LOS ANGELES MUNICIPAL COURT / LOS ANGELES JUDICIAL DISTRICT
WEST LOS ANGELES BRANCH / JANUARY THRU APRIL, 1974

January:

802919
802920
803162
803229
803321
803326
803420
803422
803481
803593
803612 TOTAL FOR MONTH: 12

February:

803785
803855 *
803884 *
804051
804254
804255
804271 TOTAL FOR MONTH: 7

March:

804566 *
804584 *
804333
804547
804695
804702
804716
804773 *
804823
804829 TOTAL FOR MONTH: 10

April:

805013
805107 *
805246
805351 *
805367 *
805375
805422
805479
805590 * TOTAL FOR MONTH: 9

TOTAL COMPLAINTS FILED: 38
* UNAVAILABLE: 9
TOTAL COMPLAINTS READ: 29

STATISTICAL BREAKDOWN OF ARREST REPORTS FOR 647(a) P.C. COMPLAINTS FILED WITH THE LOS ANGELES MUNICIPAL COURT / LOS ANGELES JUDICIAL DISTRICT / WEST LOS ANGELES BRANCH
JANUARY THROUGH APRIL, 1974

TOTAL COMPLAINTS FILED FOR 647(a) P.C.	38	
Unavailable from Clerk's office	9	
Total arrest reports reviewed	29	
Type of Offense:		
Solicitations:	5	
Homosexual type	4	
Heterosexual type	1	
Engaging:	24	
Homosexual type	18	
Heterosexual type	6	
Gender of offender:		
Male	28	
Female	1	
Complaining witness:		
Private citizen	1	(heterosexual type case)
Plainclothes vice officer	25	(22 gay cases / 3 hetero cases)
Uniformed police officer	3	(all heterosexual type cases)
Place of arrest:		
Bar	2	(both gay cases)
Vehicle	2	(both hetero cases)
Park	8	(all gay cases)
Restroom	8	(all gay cases)
Movie	1	(gay case)
Other	8	
PERCENTAGE STATISTICS:		
Homosexual type arrests	75%	
Heterosexual type arrests	25%	
Arrests by plainclothes vice	88%	homosexual / 12% heterosexual
Arrests in bars	100%	homosexual / 0% heterosexual

Type of Offense: Solicitations

There were a total of five (5) cases involving solicitations. Of those five, four (4) were homosexual type solicitations and one (1) was heterosexual type.

All of these arrests were made by plainclothes vice officers. None of them involved a private citizen complaintant.

The one heterosexual type case arose when the vice officers were investigating an advertisement in a sexually oriented magazine. The case involved a man advertising in order to get money from offering the sexual services of his wife. The vice officers were solicited by the husband on the telephone and then they met him in person and made the arrest. Therefore, this case was really one of "prostitution" and not "lewd conduct".

One of homosexual type arrests for solicitation involved the following:

> Defendant was waiting for an elevator at the Century Plaza Hotel. While waiting for the elevator the defendant spoke to the plain-clothes officer and after a brief conversation stated, "Do you want me to come to your room with you?" The officer stated, "What for?" The reply was, "For some fun." The officer then arrested the defendant. The defendant did not specify that "fun" meant "sexual activity". Neither did he specify any form of sexual activity.

This arrest for solicitation amounted to an arrest for a solicitation of unspecified conduct which was to occur in the privacy of a bedroom.

Type of offense: Engaging in conduct

There were a total of twenty-four (24) arrests for engaging in "lewd or dissolute conduct". Of those six (6) were for heterosexual type and eighteen (18) were for homo-sexual type conduct.

The conduct for which persons were arrested ranged from mere "kissing and embracing" , cunnilingus, masturbation & fondling.

In two cases,plainclothes vice officers entered a gay bar and arrested the defendants for merely "kissing and embracing one another". These cases were ultimately dismissed by the Court. No heterosexuals were arrested for similar type conduct.

Gender of offender:

Of the twenty-nine (29) cases reviewed, twenty-eight (28) were male defendants, and only one (1) was a female.

The case involving the female really involved prostitution, but the arresting officers were unable to prove that money was involved. The police did report that this was an area were prostitution was known to exist.

Complaining witness:

There was only one formal private citizen complaint for 647(a) arrests. This case was heterosexual in nature.

It is interesting to note a comparison for the ratio of citizen complaints for 314.1 (indecent exposure) arrests. While conducting this study, the researcher reviewed eight (8) 314.1 prosecutions. Of those, six (6) were prosecuted after formal citizen complaints. "Formal citizen complaint" means that the citizen's name actually appears on the arrest report as a complaining witness.

Twenty-five (25) cases were prosecuted upon complaint by a plainclothes vice officer only. All homosexual type arrests were made by plainclothes vice officers without a formal citizen complaint. Plainclothes vice officers arrested only 3 heterosexuals (two of these cases were really prostitution in nature).

Three persons were arrested by uniformed officers (all of these were heterosexual in nature).

Place of Arrest:

Only two (2) arrests were made in bars. Both of these were made by plainclothes vice officers in a gay bar. These arrests were for mere "kissing and embracing" between two men. The police did not go to any hetero-sexual bars, or at least no arrests were made in such establishments.

Only one (1) arrest was made in a theatre. This was made after the officers observed the defendant masturbating. The officers checked beneath and around his seat to find signs of "fresh semen".

Numerous arrests were made in parks and restrooms. All of these cases were homosexual in nature.

Two arrests were made with the defendants in cars. In both of those the police just sort of stumbled upon the defendants and found them to be engaging in cunnilingus and/or fondling the genital area of the female.

Special observations:

A majority of arrest reports were worded very similar in nature. However, several created serious questions about fabrication of the arrest reports, because of the virtually identical wording of the reports. Five of them were done by Officer Gray, Serial Number 13654.

After reading the arrest reports, the contents, and observing the place of arrest, gender of arrestee, and other circumstances, it became apparent that only male vice officers were employed to enforce Section 647(a) P.C. Female vice officers were not employed to enforce this Section.

It also appeared that the police continued to go to the same places to make arrests, especially those places where they thought they would find homosexual conduct. These were really two places, the restroom on Pacific Coast Highway at Will Rogers State Beach, and Vista Del Mar park.

Finally, a note about the "canned" statements appearing at the beginning of most arrest reports; which were all

worded the same. Each stated: "Due to numerous complaints about homosexual conduct or lewd conduct" the officer had gone to the location. However, in none of these cases did the name of the complaining citizen appear.

Disposition of cases:

Instead of going to trial, most of the defendants engaged in plea bargaining.

On a percentage basis, heterosexuals received more dismissals, lighter fines and, shorter or no probation periods.

Gays received, on the average, $100.00 fine, 18 to 24 months probation, and severe conditions of probation. Many gays received a condition of probation stating that they could not either: 1) Associate with known homosexuals, or 2) Frequent a place where homosexuals congregate.

In no case did a heterosexual receive a condition of probation disallowing them to: 1) Associate with known heterosexuals or 2) Frequent a place where heterosexuals congregate.

Conclusions:

See page four for a statistical breakdown of data.

1. The police seem to equate the phrase "lewd and dissolute conduct" with "homosexual conduct".

2. No formal citizen complaints were made against homosexual conduct.

3. Homosexuals were only arrested by plainclothes vice officers.

4. The only bars in which arrests were made were gay bars.

5. The police considered mere "kissing and embracing" between members of the same gender to be "lewd and dissolute conduct".

6. One vice officer arrested a gay man for merely requesting "to go up to the officer's private hotel room

to engage in unspecified conduct which he referred to as "fun".

7. Many arrest reports gave the indication of fabrication because of their virtually identical wording with other arrest reports written on other occasions.

8. The police only employ male vice officers to enforce Section 647(a) P.C.

9. Considering that homosexuals only comprise about 10 percent of the population, the numbers of homosexuals arrested was extremely disproportionate to their numbers in the general population.

10. Police officers only arrest heterosexuals for violating Section 647(a) P.C. when they stumble upon them and actually catch them in the act, or when a private citizen makes a formal complaint thereby requiring action.

11. Vice officers seem to seek out homosexuals for arrest.

12. Private citizens do not seem to be greatly disturbed, or disturbed at all by homosexual conduct. This is concluded from the fact that no citizens made formal citizen complaints to the police about such conduct. However, it is apparent that when they are greatly disturbed, they will take the time to make such a formal complaint, e.g. 75 percent of arrests for"indecent exposure" resulted from formal citizen complaints.

13. Disposition of cases tends to show a bias on the part of the prosecutor and the court against gay persons. It seems that heterosexuals are the object of favoritism.

14. If the two cases which were really prostitution in nature were removed from this study, the percentage of arrests which were against homosexuals would increase to 83 percent.

_____

CHET R. TOY

Dated: July 19, 1974

PROOF OF SERVICE BY MAIL

PAULA DAVIS declares the following:

I am a citizen of California and of the County of Los Angeles, over the age of 18 years and not a party to the within action. My business address is 1800 North Highland Avenue, Suite 106, Los Angeles, California 90028.

On April 3, 1978, as to each of the parties whose names and addresses appear below, I placed one true copy of the foregoing BRIEF OF AMICUS CURIAE NATIONAL COMMITTEE FOR SEXUAL CIVIL LIBERTIES IN SUPPORT OF PETITIONER within a sealed envelope, with postage thereon fully prepaid, and deposited same in the United States mail at Los Angeles, California:

Thomas Coleman, Esq.
1800 N. Highland
Suite 106
Los Angeles, CA 90028

Los Angeles City Attorney
Mark Brown, Deputy
17th Floor
City Hall East
Los Angeles, CA 90012

Jill Jakes
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, CA 90005

Mary E. Waters
Presiding Judge
Los Angeles Municipal Court
110 N. Grand Avenue
Room 534
Los Angeles, CA 90012

Donald Knutson
c/o Pride Foundation
540 Castro Street
San Francisco, CA 94114

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3rd day of April, 1978, at Los Angeles, California.

Paula Davis

PAULA DAVIS