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NEWSLETTER

* COMMITTEE INVOLVEMENTS *

MEETING WITH CALIFORNIA PERSONNEL BOARD. Committee members met June 19 with members and staff of the California State Personnel Board to discuss implementation of Gov. Edmund G. Brown, Jr.'s recent executive order barring discrimination because of sexual orientation in State jobs. The Governor's legal affairs secretary, J. Anthony Klein, also was present. Committee members who attended were Tom Coleman, Jay Kohorn, Dick Caudillo, Paul Hardman, and Tony Silvestre. As a result of the presentation made by Coleman, Silvestre, and Hardman, plans were made for an ongoing series of meetings with staff and members of the Personnel Board, in which NCSCL members will be acting in an advisory capacity regarding the Governor's order.

According to NCSCL co-chairman Coleman, "The Board was anxious to be of assistance. They didn't originally understand the complexity of the problem of discrimination and the extent of the order's coverage. They weren't aware of the number of difficult issues and problems of implementation." Coleman will organize the advisory function of the Committee vis-a-vis the Personnel Board. The Board was made aware June 1 that, because of the principles established by the California Supreme Court in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*, the State's policy of ending employment discrimination against gay persons will not end when Brown leaves office.

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PACIFIC TELEPHONE CASE REVIEWED IN NEXT REPORTER. The next issue of the *SexuaLaw Reporter* will carry an article on *GLSA v. Pacific Telephone*, Brown's executive order, and municipal ordinances forbidding job discrimination because of sexual orientation. It will outline the various remedies currently available against such discrimination. (The following issue of the *SLR* will review the case of *Desantis v. Pacific Telephone*, decided May 31 by the 9th U. S. Circuit Court of Appeals.) A copy of the *GLSA* decision (published as 156 Cal.Rptr. 14, 595 P.2d 592)

can be obtained by writing the *SLR* (Suite 106, 1800 N. Highland Ave., Los Angeles, Calif. 90028). NCSCL member Don Knutson's Gay Rights Advocates was amicus in the case, and additional information on it can be obtained from Knutson (Gay Rights Advocates, 540 Castro St., San Francisco, Calif. 94114). NCSCL co-chairman Tom Coleman was another amicus.

The *GLSA* decision held that Pacific Telephone could not discriminate against homosexual employees or applicants. The *Desantis* decision ruled against the plaintiffs, holding "gay" not to be a suspect classification meriting "strict scrutiny" in an equal protection analysis, and declining to interpret "sex" in Federal civil rights statutes as bringing sexual orientation discrimination within the laws' coverage. NCSCL member Knutson's firm also took part in the *Desantis* case and is currently participating in a suit brought by a San Diego man, Al Best, against the employer that dismissed him after he filed as an openly gay political candidate. (This case is discussed in an article, "Homosexuals in Management," in the July 23 *Industry Week*, a controlled-circulation biweekly published at Penton Plaza, 1111 Chester Ave., Cleveland, Ohio 44114. The article is instructive in regard to management views of the gay-rights question.)

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WASHINGTON (D. C.) TRANSIT ADVERTISING. NCSCL member Leonard Graff was counsel in the successful suit of *Gay Activists Alliance v. Washington Metropolitan Area Transit Authority* (U.S.D.C., D.C.). An injunction was issued forbidding the Authority from refusing advertising space to plaintiff. The court held that, while all political advertising might have been refused, once it was accepted from some advertisers it must be accepted from plaintiff. The decision also held that a District of Columbia ordinance forbidding discrimination because of sexual orientation is not applicable to the Transit Authority because it is the result of a multijurisdictional compact and enforcement of the ordinance against it (at least in connection with the instant advertising-related issues) had not been contemplated. Graff considers the court's reasoning on this point weak. The question of damages, costs, and fees remains open.

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PARTICIPATION IN OKLAHOMA, TEXAS STUDENT CASES. The NCSCL is seeking amicus curiae status in two cases involving university denial of recognition and benefits to gay student organizations. In the U. S. District Court for the Western District of Oklahoma, such status is being sought in cooperation with plaintiff's counsel Glen Rawdon (*Gay People's Union v. Trustees of University of Oklahoma*). In the U. S. Court of Appeals for the Fifth Circuit, a request for amicus status is being prepared by Mary Dunlap, formerly of San Francisco's Equal Rights Advocates and now a visiting professor at the University of Texas School of Law (*Gay Student Services v. Texas A. & M. University*). In the *Texas A&M* case, J. Patrick Weisman, of Houston's Pape & Mallett, is plaintiff's counsel.

The National Gay Task Force, represented by NCSCL member Don Knutson's Gay Rights Advocates, is already amicus curiae in the *Texas A&M* case. And in an earlier Oklahoma case--*Gay Activists Alliance v. Trustees of University of Oklahoma*, now before the Oklahoma Supreme Court--GRA is also amicus; however, it is likely that the Federal case will be decided before the State case, says NCSCL co-chairman Tom Coleman.

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OHIO SOLICITATION CASES. Two cases involving Ohio's statute forbidding solicitation for homosexual (but not heterosexual) activity were disappointing. In *State v. Phipps*, the Ohio Supreme Court on June 6

reversed a lower appellate court that had declared the statute unconstitutional on vagueness and First Amendment grounds. By a 6-1 vote, the Supreme Court construed the statute as being a form of constitutional "fighting words" statute and remanded the case to the trial court. It is unclear from the Supreme Court's decision what is required for conviction, but the traditional "fighting words" standards would not govern, says NCSCL co-chairman Tom Coleman. Coleman and NCSCL member John Quigley were counsel for the NCSCL and the Columbus chapter of the National Lawyers Guild as joint amici curiae.

In *State v. Faulk*, the same statute had been held by the same lower appellate court (but with two different judges sitting) to be violative of equal protection but not void for vagueness or First Amendment reasons. In a move that Coleman calls "ridiculous," the Supreme Court failed to act on a *Faulk* petition for hearing until the day *Phipps* was decided, when the petition was granted, the lower court was summarily reversed, and the case was remanded for trial on the "authority" of *Phipps* (which had not decided the equal protection issue).

(In 1974, the Ohio Supreme Court had upheld the Secretary of State's denial of incorporation to a Cincinnati gay group, holding--against the views of the State's own attorneys--that, despite decriminalization of homosexual activity, the "promotion of homosexuality as a valid life style" still violated public policy even though no previous Ohio Supreme Court decision had even used the word "homosexual," much less discussed its policy implications.)

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CONSENSUAL SODOMY STATUTES TESTED. In a New York case, *People v. Onofre*, NCSCL consultant William Gardner, of Buffalo, is preparing the Committee's brief as amicus to the New York Supreme Court's Appellate Division. Defendant was originally charged with three counts of forcible sodomy and one of consensual sodomy with a 17-year-old male; however, the forcible counts were dismissed after the "victim" admitted that no force was involved. Defendant was then convicted of consensual sodomy, a comparatively rare judicial event, yielding the opportunity of testing New York's statute as applied to consensual activity. Appellant's counsel is Bonnie Strunk of Syracuse.

The local district attorney is representing the People after the New York Attorney General declined to participate in the appeal. An excerpt from Attorney General Robert Abrams' March 10 speech attacking the New York statute's constitutionality is to be included in the NCSCL amicus brief. The speech was delivered to a conference on gay rights and the law at New York University.

And in Pennsylvania, NCSCL co-chairman Arthur Warner and member Tony Silvestre have been investigating possible involvement in another (heterosexual) consensual sodomy case. Warner reports that he has already procured a law professor's services as amicus counsel and that Philadelphia's Eromin Center plans also to be amicus, with Donald Martin of Norristown as counsel. The NCSCL amicus brief would probably concentrate on privacy arguments.

The case, which was reported in the August 4 issue of Boston's *Gay Community News*, involves staff and patrons of Pittsburgh's Penthouse Theater, where patrons allegedly were permitted to participate on stage in various sexual acts with dancers. Four employees were held to trial on charges of voluntary deviate sexual intercourse and criminal conspiracy. The Allegheny County Criminal Court's Judge George Ross ruled the statute on voluntary deviate sexual intercourse unconstitutional, citing case law in other jurisdictions holding sexual activity not involving force, corruption of minors, or public offense to be

outside the criminal law's proper ambit. He also held the statute to be violative of equal protection because it exempts married couples.

The case is complicated by inept drafting of the Pennsylvania law: If the county prosecutor appeals and the trial court is upheld, the statutory section involved so intertwines the definition of both voluntary and involuntary deviate sexual intercourse that the prohibition of involuntary activity would be stricken as well, thus possibly motivating the legislature to enact a replacement statute that would be more objectionable than the present one (the legislature might prohibit only same-sex activity, a prohibition more difficult to challenge judicially than the present prohibition of both heterosexual and homosexual unmarried "deviate" activity). However, even without the section under attack, another statutory section defines rape to include involuntary sexual activity per os or per anum.

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TOILET SPYING CASE. Kalamazoo's William Schma is counsel in a Michigan prosecution for consenting homosexual activity through a public restroom "glory hole" behind closed doors but observed by a ceiling camera. So far, the warrant for the filmed observation has been attacked on privacy grounds, but the "gross indecency between males" statute has not yet been called into question. If it is challenged for vagueness and overbreadth, NCSCL co-chairman Coleman (originally from Michigan) feels that at least three Michigan Supreme Court justices would be likely to view the challenge sympathetically.

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SLR AIDS HISTORICAL RESEARCH. New York gay academic activist Jim Levin recently visited Los Angeles offices of the *SexuaLaw Reporter* as part of his research on a forthcoming work on the gay rights movement as one of several social change movements. He copied hundreds of pages of legal materials at *SLR* offices and also collected material from Dorr Legg of ONE, Inc., and from Jim Kepner's gay archives. He will also visit NCSCL co-chairman Warner. NCSCL members are invited to advise Tom Coleman or Arthur Warner of briefs or other legal materials in their possession that might be included in the documentary project.

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STATUS OF NCSCL'S HOTEL SUIT. In 1978, as some members will recall, the Committee's plans to hold a conference at San Francisco's Sheraton-Palace Hotel were thwarted when the hotel cancelled its booking. Subsequently, suit was filed in the Committee's behalf, and the defense is conducting extensive discovery. A deposition has already been taken of NCSCL member Dick Caudillo, who was in charge of conference arrangements; other depositions were scheduled for Woody Tennant in late July and Tom Coleman in mid-August. NCSCL member Don Knutson is counsel.

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CHICAGO SOLICITATION ORDINANCE BLOCKED. Action by NCSCL member Bill Kelley and the Illinois Gay Rights Task Force prevented passage by Chicago's City Council of a prostitution-control ordinance that would have prohibited loitering for "deviate sexual conduct" as well. The latter language was apparently adapted by aldermanic drafters from a New York measure, and they were surprised when its import was explained to them. Stating that they had had no intention of legislating against homosexuals, they amended their own bill June 20 to eliminate the phrase. In its lobbying effort, the IGRTF chose not to take on the broader issue of prostitution itself.

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* NEWS NOTES *

GAY ALIENS. In a case being handled by NCSCL member Don Knutson's firm, a London *Gay News* reporter, Carl Hill, was detained by immigration authorities when he alighted at San Francisco's airport wearing a gay pride button (his lover passed authorities sans button or challenge). Suit was filed to enjoin the U. S. Public Health Service from examining Hill for homosexuality under the Immigration and Nationality Act's exclusionary provisions. As the PHS was on the verge of settling by stipulation not to conduct such examinations in future because of revised medical opinion regarding homosexuality, the Justice Department forbade the settlement, and the case is now headed for trial. However, subsequently on August 2 the PHS issued its own memorandum (not subject to Justice Department jurisdiction) advising its personnel to cease conducting examinations of suspected homosexuals. Although the PHS did not say so, the position of the National Gay Task Force (which has negotiated with PHS and the INS for two years on the issue) is that the law vests exclusive authority in the PHS to rule on medical excludability questions. Heretofore, the INS has rested its exclusion of homosexuals primarily on medical grounds and on the supposed intent of Congress; whether the INS will now retreat solely to the intent grounds or move to new grounds (such as the illegality of homosexual acts) remains to be seen, as does the effect of the August 2 memorandum on the *Hill* case. The August 12 New York *Times* reports on the matter and quotes an INS lawyer as saying: "We have to find a way to enforce the law, and that's what we're working on now." Meanwhile, two Mexicans detained as suspected homosexuals and represented by Knutson's firm were to appear August 14 before an INS judge in San Francisco (they arrived August 3). They are Javier Cruz Garcfa and Eduardo Roman Martfnez, both of Veracruz; regardless of the August 14 outcome, according to the *Times*, "there is certain to be an appeal."

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HASTINGS LAW JOURNAL. The March 1979 issue of the *Hastings Law Journal* (available for $3 from 198 McAllister St., San Francisco, Calif. 94102) is a symposium issue on "Sexual Preference and Gender Identity," dealing mostly with gay rights (one article discusses *City of Chicago v. Wilson*, 389 N.E.2d 522, a recent Illinois Supreme Court case on transvestism). Included is a long survey article on homosexuals' legal status by Rhonda R. Rivera of Ohio State University and an article, "Sexual Autonomy and the Constitutional Right to Privacy," by NCSCL member David Richards.

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GAY RIGHTS BIBLIOGRAPHY. Barbara Gittings, longtime gay bibliographer, is preparing a list of books, articles, and other publications dealing with the legal status of homosexuals. It is selective and so far is not intended to include cases as such. Persons with suggestions for materials to include can contact her at P. O. Box 2383, Philadelphia, Pa. 19103 (send postage for a copy of the draft). Her lists receive wide circulation among libraries and the public. The bibliography should be useful for both lay persons and lawyers.

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SAME-SEX DANCING. An Austin (Tex.) jury found that the Driskill Hotel's disco violated the city's gay rights ordinance when it forbade same-sex dancing, but the hotel says it will appeal in this first test of the ordinance, asserting that the ordinance is preempted by State trespassing law. In a similar case several years ago, a Bloomington (Ind.) gay rights ordinance was held by the administrative agency not to apply to a same-sex dancing ban (the winning argument being that the ban applied to both heterosexuals and homosexuals and that the sex of one's dancing partner is no indication of one's sexual orientation). In the Austin case, the

city prosecutor successfully argued that the impact of the ban was to affect gay people almost exclusively. The case is reported in the August 23 *Advocate*, but *Newsletter* editors have no further information.

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LESBIAN CUSTODY. A lesbian mother was awarded custody of her two adolescent daughters against the claim of their father in a July 23 decision by the Appellate Division of Superior Court in Trenton (N. J.). By a 2-1 vote, the court decided that, while the girls probably would face "community disapproval" of their mother's sexuality, "this does not necessarily portend that their moral welfare or safety will be jeopardized," and the father has a "troubled and deviant" personality while the mother was dutiful. The appellate decision automatically qualifies for review by the New Jersey Supreme Court. The parties were identified only by initial. Judge Melvin P. Antell, author of the majority opinion, compared the case to a 1973 Pennsylvania Supreme Court ruling that overturned a lower court decision that children should be taken from a mother who entered an interracial marriage.

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ZONING AND SINGLE PERSONS. A July 30 ruling by the New Jersey Supreme Court held unconstitutional a zoning ordinance restricting the number of unrelated persons entitled to share a single housing unit. The 5-2 decision rested on due-process and privacy grounds under the New Jersey constitution. The case involved the Rev. Dennis Baker and the municipality of Plainfield, and it upheld a lower court decision in favor of Baker. It contrasts with the 1974 U. S. Supreme Court *Belle Terre* decision sustaining such ordinances against Federal constitutional attack. The New Jersey court found the *Belle Terre* reasoning "unpersuasive." Afterwards, opinion author Justice Morris Pashman said he had had many inquiries from all over the U. S. about the decision and that the first request for its text came from the California Supreme Court.

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NUDE SUNBATHING. The New York City Council is likely to pass a bill unanimously recommended by a committee that would provide for some "optional swimsuit" sunbathing areas in the nation's largest city. Committee action came July 30 on the bill, which in its original form was intended to prohibit nude sunbathing at any waterside location. As amended, it gives the Park Commissioner the right to designate "a properly enclosed area" for suitlessness; elsewhere, nude sunbathing would be subject to a $25 fine and up to 10 days in jail.

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INCESTUOUS MARRIAGE. A Salem (Mass.) Superior Court judge sentenced a brother and sister, David Goddu and Victoria Pittorino, to a one-year suspended sentence and two years' probation because of their incestuous marriage May 25. They had been separated 20 years ago by adoption and, after successfully searching for each other through birth records, met, fell in love, and were married.

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FEDERAL CRIMINAL CODE. Chances for adoption of a Federal criminal code improved August 1 when House Judiciary Committee chairman Rep. Peter W. Rodino, Jr. (D-N.J.) announced that a draft code, prepared in the House Subcommittee on Criminal Justice, will be considered by the House and that it is generally parallel to a version to be considered simultaneously by the Senate, thus ending a recurring stalemate between the two houses. However, there will be important differences between the two versions. Rodino's news conference was also attended by Sen. Edward M. Kennedy (D-Mass.), chairman of the Senate Judiciary Committee. The House version would remove all Federal obscenity laws from the books, according to the New York *Times*, and would make rape by a spouse a criminal offense in Federal jurisdiction. The full House Judiciary Committee plans to

consider the bill "expeditiously" this autumn. Kennedy said he would introduce a Senate version in September and begin hearings then. The House bill would establish judicial sentencing guidelines, would amend civil rights laws to encompass sex discrimination, and (according to the *Times*) "limits the extent of Federal jurisdiction more than last year's Senate bill."

Besides the exemplary effect of a Federal criminal code for future drafters of reformed State codes, an early draft of a Federal code would have provided that, in the comparatively few instances in which prosecutions for State-defined sex offenses were conducted in Federal court because the offense allegedly occurred in Federal jurisdiction, the penalty imposable by the Federal court under the "assimilated" State law could not exceed a reasonable maximum set by the Federal code regardless of the severity of the penalty set by the State law. This provision was absent from later Federal drafts; Bill Kelley learned from the subcommittee August 13 that its forthcoming draft will contain such a provision.

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* COMMITTEE INVOLVEMENTS (ADDENDUM) *

GAY RELATIONSHIP LAWSUIT. NCSCL member Leonard Graff is representing defendant David Elwing in the suit brought by Elwing's former lover, Don Cox, seeking $100,000 for breach of contract and in compensation for housekeeping duties. Thomas Gaye, of Washington (D. C.), represents the plaintiff. In the suit--*Cox v. Elwing*, No. 81-29-79, D.C. Sup. Ct., filed June 26--plaintiff relies on *Marvin v. Marvin* principles, but, according to the July 16 *National Law Journal*, a conflicts issue as to whether Illinois or District of Columbia law should apply may be involved. The parties were united in a Metropolitan Community Church ceremony in Chicago two years ago; Illinois has no sodomy law, but the District does, and the latter fact might affect the validity of the alleged oral contract. The case received major publicity in the Washington press and nationally as well; Elwing is a Government employee, heretofore not publicly gay, but, according to Graff, he has not yet experienced notable repercussions at work.

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Addresses for all NCSCL members can be found in the list recently circulated by Tom DePriest of the membership subcommittee.

Please don't forget to let Tom know if you will be attending the November 3-4 NCSCL business meeting in Washington and if you'll need a hotel room. Address: Thomas B. DePriest, Apt. 304, 802 N. Wayne St., Arlington, Va. 22201. He needs to know as soon as possible.

Please let the Newsletter *editors know of news, corrections, and other items for inclusion. Our addresses: William B. Kelley, Apt. 3N, 550 W. Surf St., Chicago, Ill. 60657; Joseph M. DeLisa, 5617 S. Drexel Ave., Chicago, Ill. 60637.*

Three publications whose attentive coverage of legal developments will help you to keep abreast of gay rights news: Gay Community News *(weekly; $17.50/yr.; 22 Bromfield St., Boston, Mass. 02108);* The Blade *(biweekly; $8.50/yr.; Suite 225, 2430 Pennsylvania Ave., N.W., Washington, D. C. 20037);* The Advocate *(biweekly; $27/yr.; Suite 225, 1730 S. Amphlett, San Mateo, Calif. 94402). Shorter-term subscriptions are also available. In addition,* The Body Politic *(10 issues/yr.; $5/yr. [US$8.50/yr.] 2d-class; P. O. Box 7289, Sta. A, Toronto, Ont., Canada M5W 1X9) contains much material on many fascinating Canadian legal developments.*