MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, -v- FABIAN FARNIA, et al., Defendants.	Case No. 311-35003 SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

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I

Introduction

The scope of this reply is limited to the area of Privacy, since that is the basis upon which all other areas are hinged. The First Amendment speech arguments, for example, are based upon the premise that the underlying conduct is constitutionally protected and, at most, subject to reasonable regulation, not total prohibition.

II

Scope of the Right to Privacy

The material in this reply is meant to supplement and not supercede the extensive sections on privacy in Defendant's original Points and Authorities. Redundancy with those sections will be avoided wherever possible.

The "fundamental" nature of the right to privacy derives from the very nature of man. Justice Brandeis in Olmstead v. United States, supra, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, 956, stated:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. ***They conferred, as against the government, the right to be let alone, the most comprehensive of rights and the right most valued by civilized men.*** To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation . . ." (Italics added.)

The right to control one's own body in deciding medical treatment, for example, is not restricted to the wise. The now Chief Justice Burger, in his dissent in Application of President & Board of Directors of Georgetown Col., 118 U.S.App.D.C. 90, at page 97, 331 F.2d 1010, at page 1017, commented:

> "Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, valid thoughts, reasonable emotions, or well-founded sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do

not conform, such as refusing medical treatment even at great risk." (Emphasis added.)

This basic foundation--beyond constitution and statute--of the right to privacy is found in the classic treatise, On Liberty, by John Stuart Mill (George Routledge 1905). In that work, the philosophical underpinnings find their most literate expression:

> "[T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance; for whatever affects himself, may affect others through himself; . . . . This then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong . . .
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> " . . . The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest."

Mill concludes, "over himself, over his own body and mind, the individual is sovereign." (Pp. 13-18.)

In addition, Mill gives substance to the concept of "compelling state interest" when he asserts:

> " . . . one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually, or collectively, in

interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

The privacy provision of the California Constitution, Article I, Section 1, is independent from and may be broader than the protections afforded under the Federal Constitution. "The [federal] Constitution does not explicitly mention any right of privacy." Roe v. Wade (1973) 93 S.Ct. 705, 726. Until recently, neither did the California Constitution.

"[i]n November 1972, the voters of California specifically amended article I, section 1 of our state Constitution to include among the various 'inalienable' rights of 'all people' the right of privacy." White v. Davis, 13 Cal.3d 757, 773, 120 Cal.Rptr. 94, 105, 533 P.2d 222, 233.

"A definitive map detailing the outside dimensions of this amendment's protections has not yet been published by the California courts. (Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, 656, 125 Cal.Rptr. 553, 542 P.2d 977, see People v. Priviters (1979) 23 Cal.3d 697, 711, 153 Cal.Rptr. 431, 439, 591 P.2d 919, 927. (Bird, C.J. Diss. Opn.: "The right of privacy is a concept of as yet undertermined parameters.") However, we have learned enough from the first sketchings (People v. Privitera, supra) to disagree with respondent's opinion that the right is limited to protection from governmental snooping.

"People v. Privitera, supra determined only that the right under consideration does not encompass 'a right of access to drugs of unproven efficacy' in the treatment of terminal cancer. (23 Cal.3d at p.709, 153

Cal.Rptr. at p. 438, 591 P.2d at p. 926.) Although the majority there also noted that the 'principle objective' of the constitutional amendment was to restrain information activities of government and business, the decision does not purport to constrain the application of this constitutional protection to such cases. (Id., at pp. 709 710, 153 Cal.Rptr. 431, 591 P.2d 919.)" N.O.R.M.L. v. Cain (1979) 161 Cal.Rptr. 181, 183-184.

Furthermore, the United States Supreme Court decisions regarding the right of privacy are not binding on California courts.

"In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." Serrano v. Priest, 18 Cal.3d 728, 764, 135 Cal.Rptr. 345, 366, 557 P.2d 929, 950, quoting People v. Longwill, 14 Cal.3d 943, 951, fn. 4, 123 Cal.Rptr. 297, 538 P.2d 753.

It must be noted that the right of privacy is "a concept of as yet undetermined parameters . . ." See dissent in People v. Privitera (1979) 23 Cal.3d 697, 153 Cal.Rptr. 431. The concept is yet expanding and as yet judicially unmeasured.

The People's brief implies that the California right to privacy is narrowly limited to instances of privacy invasions by way of clandestine surveillance. A circumspect reading of Privitera, supra, and N.O.R.M.L., supra, indicate to the contrary. The "legislative history" of the California Constitutional Right to Privacy closely parallels the thoughts, in fact uses the exact words, of Justice Brandeis in his dissent in Olmstead v. United States (1928) 48 S.Ct. 564. Based upon the "legislative intent" derived from the language of the 1972 California election brochure, one must conclude that this right is not merely a shield against threats to personal freedom posed by modern surveillance activities. That brochure declared that the right of privacy protects "our homes, our families, our thoughts, our emotions, our expressions, our personalities . . . ."

Further, there is a substantial difference between drug cases, in which the state has maintained sovereignty over the entire field for the health and safety of its citizens, and the area of sexual conduct, in which the state continues to recognize the importance of the sovereignty of the individual and the individual's right to make personal decisions.

In the most recent pronouncement by a California appellate court concerning the right to sexual privacy, Wellman v. Wellman, 80 Daily Journal D.A.R. 1121 (C.A.1st, April 24, 1980), it was noted:

> "Our state Supreme Court has referred to a constitutional right of privacy 'in matters related to marriage, family, and sex.' (People v. Belous (1969) 71 C.2d 954, 963.)" Wellman, supra, at fn. 5.

Speaking of sexual conduct between consenting adults, the Court in the Wellman case stated: "[S]uch conduct has been held to be within the penumbra of constitutional protection afforded rights of privacy . . . so that intrusion by the state in this sensitive area is not a matter to be taken lightly."

As the Wellman court also noted, "At least one decision of the California Court of Appeal appears to be in accord." In that case, Fults v. Superior Court (1979) 88 C.A.3d 899, 904, the court considered "one's sexual relations" as a "well established 'zone of privacy.'"

At this point, there should be no doubt that private sexual conduct between consenting adults is a fundamental right protected by the right to privacy, particularly under the California Constitution, thereby requiring a compelling state interest and strict scrutiny of any regulation by the state.

The critical question again emerges: DOES THE MERE FACT THAT MONEY OR OTHER CONSIDERATION PASSES BETWEEN CONSENTING ADULTS IPSO FACTO AUTHORIZE THE STATE TO IMPOSE A TOTAL PROHIBITION OF THIS OTHERWISE CONSTITUTIONALLY-PROTECTED CONDUCT?

The answer to this question can be explored through two foundational questions. Does the fact that some form of consideration is involved in the relationship between the adults automatically remove the conduct from the zone of privacy, thereby changing the standard of review? If not, then is there a compelling state interest created by the commercial aspect of the sexual conduct, thereby justifying a total prohibition as the least intrusive means of regulation?

The constitutionality of the engaging portion of the statute hinges on the answers to these questions. Likewise the analysis of the solicitation portion of the

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statute depends on the outcome of these questions since the First Amendment does not protect solicitations to commit criminal activity.

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