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## SUPREME COURT TO DECIDE RIGHTS OF CONSENTING ADULTS

On October 3, 1983, the nation's highest court granted a petition for a writ of certiorari in New York v. Robert Uplinger and Susan Butler, No. 82-1724. The petition had been filed by the district attorney of Erie County.

The Supreme Court will be reviewing the opinion of the New York Court of Appeals [People v. Uplinger (1983) 447 N.E.2d 62] in which New York's highest court declared unconstitutional (on federal grounds) Penal Law Sec. 240.35(a)(3). This provision made it a crime for a person to loiter in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse. The New York Court of Appeals said that the loitering statute "must be viewed as a companion statute to the consensual sodomy statute . . . which criminalized acts of deviate sexual intercourse between consenting adults." The Uplinger opinion added: "We held in People v. Onofre [(1980) 415 N.E.2d 936] that the state may not constitutionally prohibit sexual behavior conducted in private between consenting adults. The object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy. Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose. This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute."

It should be noted that after the New York Court of Appeals had voided the consensual sodomy statute on privacy and equal protection grounds, the United States Supreme Court denied the petition of the district attorney for a writ of certiorari. People v. Onofre (1980) 451 U.S. 987. The consensual sodomy statute prohibited oral and anal sexual acts between persons not married to each other (regardless of sexual orientation). Half the states in this country have similar sodomy laws on the books at the present time.

In his petition for a writ of certiorari in Uplinger, the district attorney has asked the Burger Court to render an opinion on the state's authority to punish private sexual conduct between consenting adults. In the petition, the prosecutor wrote: "To the extent that the decision in the present case was predicated upon People v. Onofre, supra, and represents an improper extension of an unfounded decision, petitioner requests that in the event certiorari is granted with respect to the loitering statute, that review also be granted with respect to the consensual sodomy statute."

It is likely that through Uplinger the Supreme Court will render an opinion on whether or not private sexual conduct between consenting adults is constitutionally protected. Since Uplinger is predicated on Onofre, it would take a herculean effort of a sympathetic court to avoid discussing the accuracy of Onofre while rendering its opinion in Uplinger. The direction that federally protected sexual privacy rights will take for years to come is at risk in Uplinger.

—T.F.C.



## ACTION ON RECOMMENDATIONS

**GAY IMMIGRATION BAN VOIDED:** On Sept. 7, 1983 the U.S. Court of Appeals for the 9th Circuit held that the INS could not ban gays from entering the country without Public Health Service certification that they are afflicted with a mental defect, sexual deviation or psychopathic personality. Hill v. INS, No. 82-4366. But, on Sept. 28, the 5th Circuit ruled, in a 2-1 decision, that a PHS certificate is not necessary to exclude a gay from entering the country. Since legal entry is a prerequisite to naturalization, the court held the INS could deny Richard Longstaff citizenship status. The 5th Cir. decision conflicts with an earlier naturalization decision in which a gay man won citizenship. Nemetz v. INS (4th Cir., 1981) 647 F.2d 432. [See Commission Report, p. 363, Exec. Summary, p. 107]

**FAIR EMPLOYMENT:**(AB 1) Would ban sexual orientation discrimination by private employers in California. It has passed all legislative committees and is awaiting a vote by the full California Senate when it reconvenes in January, 1984. Author: Art Agnos (D-San Francisco) [See Report, p. 426, Exec. Summary, p. 76]

**FREEDOM FROM VIOLENCE:** (AB 848) Would mandate perpetrators of violence against gays, elderly, and disabled persons to pay a minimum of \$10,000 to their victims. Passed all legislative committees and awaits vote by full California Senate when it reconvenes in Jan., 1984. Author: Tom Bates (D-Oakland). [See Report, p. 385; Exec. Summary, p. 66]

**JUROR PRIVACY:** The U.S. Supreme Court heard argument about jurors' privacy rights during voir dire. In People v. Greenwood, the California Court of Appeal upheld a trial court order barring reporters from voir dire during the rape trial. Deputy Riverside County Counsel Glen S. Salter urged the justices to uphold the decision because it protected jurors' privacy, especially during questioning about their own sexual victimization.

Also of interest, Nashville Judge A.A. Birch ordered physical seizure of citizens for jury duty because of a shortage. [See Report, p. 290, Exec. Summary, p. 57]

**EMPLOYEE PRIVACY RIGHTS:** (AB 621) Would prohibit employers from questioning job applicants about their personal lives or engagement in lawful activities. Passed all committees and awaits vote by full Senate when it reconvenes in January, 1984. Author: Johan Klehs (D-San Leandro) [See Report, p. 255, Exec. Summary, p. 76]

## OTHER CALIFORNIA LEGISLATION

- **Personnel Board Appeals:** (AB 524) Provides for reimbursement of legal expenses of state employees who win cases before SPB Appeals Board. Ties reimbursement to SPB Rule 547 which presently does not mention "sexual orientation." But, SPB could amend the rule to cover gays. Bill has been sent to governor. Author: Elihu Harris (D-Oakland)

- **Firefighters Bill of Rights:** (AB 91) Gives firefighters the same protections now afforded police officers against lie detector tests and interrogations by supervisors. Sent to governor. Author: Dominic Cortese (D-San Jose)

- **Adoption Information:** (AB 2096) Persons adopted after Jan. 1, 1984 would be able to connect with their natural parents after the adoptee reaches 21, if both adoptee and natural parent consent. Bill has been sent to governor. Author: Robert Campbell (D-Richmond)

- **Strip Search Bill Vetoed:** (AB 270) Would have applied to pre-trial detainees on misdemeanor or infraction charges and would have prohibited strip searches or body cavity searches without a warrant unless the offense involved drugs, weapons, or violence. Governor said the bill imposed "unrealistic" restrictions on law enforcement and infringed safety of jails. Author: Maxine Waters (D-Los Angeles)

- **AIDS RESEARCH:** (SB 910) Would provide for research, education, and workshop grants and would create an AIDS Advisory Committee to advance knowledge about the disease. 1983 Budget Act gave \$500,000 to implement this bill, if passed. Awaits final vote in the full Assembly. Author: David Roberti (D-Los Angeles)



## OTHER CALIFORNIA LITIGATION

• **BOY SCOUTS CAN'T EXPEL GAYS:** Boy Scouts can't expel members for being gay, the Court of Appeal has ruled. Justice Leon Thompson wrote the opinion for the Second District's Div. Seven. The case is Curran v. Mount Diablo Council of Boy Scouts of America, 2 Civ. No. 66755. [Ed: Curran had testified before the Commission on Personal Privacy about his expulsion and had become a member of the Commission's Youth Advisory Task Force.] Thompson said the expulsion violated the common law right of fair procedure and also violated the state's Unruh Civil Rights Act.

• **SETBACK FOR COUPLES' RIGHTS:** An unmarried cohabitant may not state a cause of action for loss of consortium, the Court of Appeal has ruled. Acting Justice Breiner wrote the opinion for the First District's Div. One. The case is Hendrix v. General Motors, 1 Civ. No. 52720. Breiner acknowledged that the opinion was "essentially political." He indicated that unmarried cohabitants should not be given special protections as married couples now receive under the law. His opinion ignores its impact on gay couples. The case may be headed for the California Supreme Court because it conflicts with a contrary decision recently rendered by the Fourth District Court of Appeal in Butcher v. Superior Court (1983) 139 Cal. App.3d 58.

• **MOTOR HOME PRIVACY:** Motor homes deserve the same privacy protections now afforded conventional residences under the Fourth Amendment, the California Supreme Court has ruled. Justice Stanley Mosk wrote the majority opinion. Justice Frank Richardson was the sole dissenter. The case is People v. Carney, Crim. No. 22047.

• **WARRANT REQUIREMENT LIMITED:** In a sharply divided 7-4 decision, the Ninth Circuit Court of Appeals has ruled that police looking for a criminal suspect pursuant to an arrest warrant, may enter and search the home of a third party without first obtaining a search warrant. The "limited en banc panel" reversed a 3-judge panel ruling to the contrary. It may affect California privacy law on the subject. The case is U.S. v. Underwood, 81-1451.

• **ARRESTEE'S SEARCH LIMITED:** The California Supreme Court has disapproved of the "accelerated booking search." The procedure had been used by police to justify full-blown searches of arrestees and their possessions prior to actual booking at the jailhouse. Although booking searches may be conducted without a warrant, they must be performed at the jailhouse and not at the scene of arrest, the court ruled. Justice Stanley Mosk wrote the opinion. Justices Frank Richardson and Otto Kaus dissented. The case is People v. Laiwa, Crim. No. 22259.

• **INFERTILITY MISREPRESENTATION:** A woman impregnated by a man who misrepresented his infertility may sue him for committing a tort, the Court of Appeal has ruled. Acting Presiding Justice James Scott wrote the opinion for the First District's Div. Three. The case is Barbara A. v. John G., 1 Civ. No. 50953. The opinion conflicts with a decision by the Second District's Div. Two in Stephen K. v. Roni L. (1980) 105 Cal.App.3d 640 which held that permitting a lawsuit based on misrepresentations between consenting adults concerning their private sexual behavior would violate the right of privacy. Scott distinguished Stephen K. Scott said the privacy considerations were outweighed by a paramount policy: "For every wrong there is a remedy."

• **"SNITCH" LAW REVIEWED:** Acknowledging the importance of the psychotherapist/patient privilege, the California Supreme Court has limited the Child Abuse Reporting Act to require only an initial reporting of an incident of child abuse, but not subsequent details learned by the doctor from a family member seeking therapy. To hold otherwise would require the doctor to advise the patient at the outset that he will violate his confidence and will "snitch" to law enforcement, Justice Stanley Mosk said. Justices Kaus and Richardson dissented. The case is People v. Stritzinger, Crim. No. 22924.

• **JESUIT REINSTATED:** In issuing a temporary injunction against "a violation of academic freedom," Los Angeles Superior Court Judge John Cole ruled that Loyola Marymount College acted illegally in dismissing a priest-professor for marrying.



## CALIFORNIA ADMINISTRATIVE ACTIONS

- **DEUKMEJIAN EXECUTIVE ORDER:** The Governor issued an order stating: "It is my policy and the policy of the State of California to eliminate discrimination in employment because of race, sex, color, religion, national origin, age, marital status and physical and mental disability." Sexual orientation was not mentioned in the order. Executive Order D-20-83 was issued on Aug. 24, 1983. Governor Brown's executive order (B-54-79) prohibiting sexual orientation discrimination in state employment remains in full force and effect. As attorney general, Deukmejian had issued an opinion upholding the validity of Brown's order. 63 Ops. Cal. Atty. Gen. 583 (1980).

- **ANTI-NEPOTISM POLICY BANNED:** The Fair Employment and Housing Commission ruled that Simi Valley was wrong in refusing to hire an auto mechanic merely because his wife already worked for the city. Blanket discrimination on the basis of marital status is prohibited, the Commission ruled.

- **POLICE INFILTRATION OPPOSED:** The Conference of Delegates at the State Bar Convention adopted a resolution calling for law enforcement agencies to obtain a warrant before infiltrating political, religious, civil rights, community, and educational organizations. The resolution was proposed by the Women Lawyers Association of Los Angeles.

- **WOMEN'S RIGHTS HANDBOOK:** The California Attorney General has updated a handbook discussing women's rights in employment, housing, credit, marriage, divorce, custody, education, and health care. In several places it mentions rights of lesbians. It may be obtained from the AG's Office, 1515 K Street, Suite 511, Sacramento, CA 95815.

- **FREEDOM OF INFORMATION LAW:** The Los Angeles ordinance giving access to certain police and government files went into effect Aug. 22, 1983. Files can be kept from the public if disclosure would be an invasion of privacy, disclose identity of a confidential source, affect the right to a fair trial, disclose security plans, endanger physical safety of any person, or jeopardize the public interest.

## OTHER NEWS

**CANADA** — Justice Minister Mark MacGuigan will recommend that Parliament abolish "writs of assistance." The writs give individual peace officers lifetime power to make searches without obtaining a warrant. The announcement followed a recommendation made by the Law Reform Commission of Canada which sought abolition of the writs after a five-year study of police practices.

**MASSACHUSETTS** — An appeals court has ruled that joint custody was properly awarded to a straight father and a lesbian mother who had divorced. The father unsuccessfully challenged the joint custody order on the grounds the mother "leads a deviant lifestyle."

Also of interest is a bill which just passed the state House of Representatives. The proposal would prohibit sexual orientation discrimination in housing, employment and credit.

**WASHINGTON, D.C.** — The Veterans Administration has just issued a policy authorizing doctors to issue "no code" or "do not resuscitate" orders for critically ill patients with the patient's permission, or, if the patient is not legally competent, the consent of the family.

In other action, the U.S. Court of Appeals has ruled that the Regan Administration had acted illegally when it used "poorly veiled threats" to persuade 4 million aged, blind, and disabled welfare recipients to authorize the IRS to turn over their tax returns to welfare agencies. The language used was "likely to coerce individuals . . . into giving up their right to confidentiality," wrote Judge Abner Mikva.

**BATON ROUGE** — Federal District Judge E. Gordon West issued a temporary injunction on Aug. 23, 1983, ordering Louisiana State University to reinstate graduate assistant Kristine Naragon. The school had stripped her of teaching duties after learning she was gay.

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