

What are lewd acts for money?

The appeal of a straight woman, convicted here on a prostitution charge, may have important results for Gays if the attorney in the case succeeds in getting section 647(b) of the California Penal Code declared unconstitutional.

Attorney Thomas Coleman, himself gay, has researched the question of prostitution thoroughly as part of his brief on behalf of Nidia Ester Bailey and cites a number of arguments which challenge the prostitution statute as it applies to both straights and gay people.

He points out that male prostitution, for example, is a relatively new concern for the penal code, which back in 1960 didn't recognize the existence of male hustlers. In that aspect, the old code might be considered more progressive than the current one, which has undergone a few additions to include gay men and women in the category of prostitutes.

Section 647(b), while not particularly relevant in much of California, is an important law in Hollywood, where hustlers abound and police are constantly busting them.

'Obviously Not'

A California appellate court in 1956, in interpreting the old statute, section 647(10), stated in its ruling on a male prostitution conviction:

"Obviously a male cannot be a prostitute and hence is not subject to prosecution under subdivision 10 of the section." At that time, the law simply referred to "every common prostitute" who "is a vagrant" and thus "punishable by a fine not exceeding \$500 . . ."

But by 1965, state legislators started to worry over male prostitution. Coleman cites in his brief an addition to the penal code which said:

"As used in this subdivision, 'prostitution' includes any lewd act between persons of the same sex for money or other consideration." Thus, in 1965 the male hustler was born as a legal entity in California.

Today's Law

A further change in the statute took place in 1969. This one deleted the phrase "persons of the same sex" and substituted more general phraseology which nonetheless still encompassed male prostitution: "As used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration."

It is this wording that Coleman challenges as unconstitutional. He focuses on the words "lewd act" and "for money and other consideration." Coleman's argument contends that the law doesn't define a "lewd act" and therefore is subject to arbitrary interpretation.

"Is an act of 'artificial insemination' of a woman by a doctor to be considered 'lewd'? Many would consider this to be either unnatural or immoral!" And that act is performed for money, he points out.

"Is an abortion performed on a woman by her doctor to be considered 'lewd'? Many Catholics would strongly urge that this is immoral."

More relevant for gay people is another question that he raises. "Dancing and kissing between persons of the same sex is not made criminal by the law in California. Because a majority of the population in California might consider it 'immoral' or 'indecent', is it also to be classified as 'lewd'?"

In the past, vice officers have sometimes considered dancing and kissing as lewd conduct among gay people.

Precedents

Courts in other states (Coleman cites Florida, Michigan, and the District of Columbia) have held that the word "lewd" is in fact "vague and overbroad" and voided its use in certain statutes.

In his brief, Coleman quotes a Justice James in the nation's capital who in 1973 addressed this question in a dissenting opinion on one case:

"The meanings of the terms 'lewd' and 'dissolute' are uncertain and in and of themselves without resort to current moral standards. But the impossibility of applying 'contemporary community standards' to moral issues has been demonstrated by the flood of obscenity cases . . ."

"The Constitution requires that a criminal statute be sufficiently definite to give reasonable notice of the prohibited conduct to those who would avoid its penalty and to appraise judge and jury of the standards for determination of guilt."

As to the words "for money and consideration," Coleman notes that sexual relations between husband and wife are encompassed within this phraseology.

"When a husband must offer some form of consideration (like a present) to his wife in order to get her to consent to intercourse, he has violated Section 647(b)," Coleman said.

THE ADVOCATE

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