

1. My Background

JD since 1973; emphasis on sex & law

SLR -- NCSCCL -- Privacy Commission -- RFRMV

2. Historical Context for Present Status

How "Sexual Minorities" are Becoming Liberated

50's: Kinsey showed gap between policy and practice

60's: beginning of American sex law reform

Illinois -- consenting sex between unmarried (and gays)
Connecticut -- contraception law overturned (privacy)

70's marital privacy expanded to privacy for all individuals
abortion decision by US Supreme Court
legislative repeals of sodomy laws

80's turning point for sexual privacy / watershed
Onofre decision -- majority now in "reformed" jurisdictions

3. California Situation

Consenting Adults Act -- 1975

Judicial Reform -- Pryor case (public v. private + right to ask)

Law Has Been Reformed -- Application to Disabled?

A. Freedom to / and Freedom from

RIGHT TO PRIVACY AND PURSUIT OF HAPPINESS (Art. I, Sec. 1)

RIGHT TO PERSONAL AUTONOMY

FREEDOM OF INTIMATE ASSOCIATION

FREEDOM FROM VIOLENCE AND INTIMIDATION

FREEDOM FROM OFFENSIVE DISPLAYS (balancing test)

B. CONSIDERATIONS

Type of conduct: exposure; self touching;
touching another; vaginal+intercourse;
anal intercourse; oral copulation

Age of Parties: age of consent

Exercise of Free Will: consent v. force

Location of Conduct: presence of potentially offended persons

C. MAJOR AREAS OF CONCERN:

sexual orientation nondiscrimination

affording areas of privacy

educating clients on rights and responsibilities

insuring "informed consent" = exercise of free will,
i.e., knowledge of nature of
the conduct & consequences

3. California Situation (cont.)

D. Statutory Protections (Welfare & Institutions Code)

F. Administrative Regulations (Title 22)

to be accorded dignity, privacy, respect and humane care, including privacy in treatment and care of personal needs

right to social interaction

right to recreational opportunities

F. Case Law:

Foy v. Greenblott (1983) 141 Cal.App.3d 1

A conservatee or other institutionalized mental patient enjoys the "same rights and responsibilities guaranteed all other persons" except those which are specifically denied by law (medically contraindicated) or court order (declaration of lack of capacity to consent).

Every institutionalized person is entitled to individualized treatment under the "least restrictive" conditions feasible -- the institution should minimize interference with a patient's individual autonomy, including her personal "privacy" and "social interaction," which includes the freedom to engage in consensual sexual relations.

Bottom Line:

Education of clients re rights & responsibilities a must

Providing zones of privacy a must

Prohibition on adult consenting sex is illegal

REASONABLE REGULATIONS OK re: time, place, and manner

SEXUALITY AND DISABILITY: PERSONAL PRIVACY PROTECTIONS AND RESPONSIBILITIES

CLIENT RIGHTS	SOURCE OF PROTECTION	PROVIDER RESPONSIBILITIES
1. RIGHT TO PRIVATE SEXUAL CONDUCT a. both gay & straight are ok b. age of consent is 18 years c. must be consent/no coercion d. not in presence of persons who may be offended by viewing e. right to ask another adult to have sex, even if request is made in public place	1. Calif. Const., art. 1, §1 (privacy and pursuit of happiness); U.S. Const. Fourteenth Amendment (implicit privacy protections); California Consenting Adults Act, Stats. 1975, chs. 71 and 877; <u>Foy v. Greenblott</u> (1983) 141 Cal.App.3d 1; <u>Michael M. v. Superior Court</u> (1979) 25 Cal.3d 608; §261.6 Pen.Code; <u>Pryor v. Municipal Court</u> (1979) 25 Cal.3d 238; <u>People v. Triggs</u> (1973) 8 Cal.3d 884	1. Protect client's right to privacy, dignity, humane care, and social interaction; normalization; provide treatment in the least restrictive environment; refrain from clandestine surveillance of client's intimate personal activities
2. RIGHT TO FAMILY PLANNING DECISIONS a. procreation choice b. contraception choice c. abortion choice d. sterilization choice e. medical decisionmaking rests in client unless court restricts	2. <u>Foy v. Greenblott, supra</u> ; <u>Committee to Defend Reproductive Rights v. Myers</u> (1981) 29 Cal.3d 252; <u>Cobbs v. Grant</u> (1972) 8 Cal.3d 229; §1880 Probate Code; 65 Ops. Cal. Atty.Gen. 417; <u>Guardianship of Tulley</u> (1978) 83 Cal.App.3d 698	2. Duties to: (1) obtain informed consent prior to rendering medical services; (2) provide prompt medical care and treatment; (3) diagnose condition or warn of risks; (4) provide contraceptive counseling or devices
3. RIGHT TO MARRY OR COHABIT a. right to marry b. right to live with partner c. right to make cohabitation agreements d. right to receive benefits	3. §1990 Probate Code; <u>Atkisson v. Kern County Housing Authority</u> (1976) 59 Cal.App.3d 89; <u>City of Santa Barbara v. Adamson</u> (1980) 27 Cal.3d 123; <u>Moreno v. U.S. Dept. of Agriculture</u> ; <u>Marvin v. Marvin</u> (1976) 18 Cal.3d 660	3. Duties not to discriminate on the basis of marital status or cohabitation status in housing provision or conditions or in delivery of services
4. RIGHT TO SEXUAL IDENTITY/LIFESTYLE a. right to be gay/bi/straight b. right to be free from governmental discrimination or private sector discrimination	4. <u>benShalom v. Secretary of Army</u> (1980) 489 F. Supp. 964; <u>Gay Law Students Assn. v. Pacific Telephone Company</u> (1979) 24 Cal.3d 458; <u>Hubert v. Williams</u> (1982) 133 Cal.App.3d Supp. 1	4. Duty not to discriminate against lesbians or gay men in housing or delivery of services in both public and private sectors; some employment protections also exist

from the
Los Angeles Daily Journal

PATIENTS' RIGHT TO SEXUAL PRIVACY

underscored by appellate court

***Hospitals Should Protect
'Right of Reproductive
Choice,' Court Says***

By DONALD ALLEN

A state Court of Appeal has held that mental institutions may be obliged to provide patients with contraceptive counseling and birth control devices.

In *Foy v. Greenblott*, AO11775, the First District Court of Appeal dismissed a "wrongful birth" action brought by a mental patient who became a mother while a patient in a mental institution. But the court remanded the case to the trial court on the contraception issue, citing the state's public policy of "maximizing patients' individual autonomy, reproductive choice, and rights of informed consent."

According to the opinion, Virgie Foy had a history of "irresponsible sexual conduct" and was sent to a mental institution in San Jose. She was found mentally incompetent and a public guardian was appointed her conservator.

Foy became pregnant while at the mental institution, but her condition was not discovered until two weeks before she delivered. She sued the public guardian for "wrongful birth," claiming the institution should have given her contraceptive counseling and provided better supervision.

In a majority opinion written by Justice Winslow Christian, the Court of Appeal said the complaint alleged nothing to justify "overriding her own wishes in reproductive matters."

"Obviously," wrote Christian, "effective hospital policing of patients would not only deprive them of the freedom to engage in consensual sexual relations, which they would enjoy outside the institution, but would also compromise the privacy and dignity of all residents."

However, "the institution's failure to provide contraceptive counseling and medication may have "actually deprived her of the opportunity to exercise her right of reproductive choice," said Christian.

Justice Marcel Poche filed a separate concurring opinion in which he characterized the complaint as a "classic example of mushball pleading that manages to waddle on the side of procedural respectability."