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APA 7th ed.
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Chicago 18th ed.
Cannon, Thomas G. "Can a State Stop Public Solicitation for Private Deviate Sex (82-1724)." Preview of United States Supreme Court Cases 1983, no. 22 (9): 365-368. HeinOnline.

McGill Guide 10th ed.
Thomas G. Cannon, "Can a State Stop Public Solicitation for Private Deviate Sex (82-1724)" (9) 1983:22 Preview US Sup Ct Cas 365.

AGLC 4th ed.
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MLA 9th ed.
Cannon, Thomas G. "Can a State Stop Public Solicitation for Private Deviate Sex (82-1724)." Preview of United States Supreme Court Cases, vol. 1983, no. 22, March 9, 1984, pp. 365-368. HeinOnline.

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Can a State Stop Public Solicitation for Private Deviate Sex?

by Thomas G. Cannon

State of New York
v.
Robert Uplinger and Susan Butler
(Docket No. 82-1724)

Argued January 18, 1984

ISSUE

In a case sure to be watched closely by the nation's gay community, the Supreme Court has been asked to decide whether states can prohibit public solicitation of deviate sexual activity. Two companion cases arising from New York, *New York v. Uplinger* and *New York v. Butler*, have raised a number of complex constitutional issues. Both cases involve criminal prosecutions under New York Penal Law section 240.35(3), which prohibits loitering to solicit for deviate sexual activities a person not married to the solicitor.

Before discussing what conduct is covered by the statute, it will be helpful to look at what is *not* covered by the statute. First, the law was expressly drafted to exclude loitering for the purpose of soliciting another for conventional sexual activities. Another statute covers such conduct but adds the further element that the solicited person be harassed or annoyed. Section 240.35(3) requires no such showing of annoyance or harassment. Second, the statute only proscribes conduct between two people who are not married to each other. The New York statutory scheme would prohibit public solicitations between spouses for sodomy, but not for other acts determined to be deviate in character. Third, the New York scheme focuses solely on the public anticipatory act of solicitation. The statute applies to all public solicitations, including public solicitations of acts to be performed in private. The New York Court of Appeals in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), held that the state may not prosecute people for engaging in deviate sexual activity in private. Thus section 240.35(3) seeks to prohibit the public solicitation of an act that cannot be prohibited if done in private. Finally, it's not clear what type of conduct falls within "deviate" sexual behavior. The statute gives three illustrations of deviancy, to which is added a catch-all phrase "other sexual behavior of a deviate nature." This last phrase is not statutorily defined.

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FACTS

Robert Uplinger was arrested in 1981 and charged with violating section 240.35 of the New York State Penal Law. An undercover police officer was working in an area of suspected homosexual activity in what was characterized by the state as "a quiet residential neighborhood." Uplinger began a conversation with the officer in the midst of a milling crowd. Uniformed police arrived on the scene and ordered the crowd to disperse. As Uplinger and the undercover officer were leaving, Uplinger offered to perform an act of oral sex in exchange for a ride home. The act was to be performed in private at Uplinger's home. The offer to perform the act was not heard by anyone other than the undercover officer to whom it was made. Uplinger was immediately placed under arrest. Testimony in the case indicated that neighborhood residents had been annoyed by being propositioned while waiting for the bus. Uplinger was convicted and fined $100.00.

Susan Butler was also arrested in 1981 for loitering contrary to section 240.35. A police officer watched her wave at passing cars for approximately ten minutes. She attempted to stop three or four vehicles. At one point, she conversed with a driver for two or three minutes. She then entered the driver's automobile, which backed down a side street. The police officer observed Butler committing an act of oral sodomy on the driver. Butler and the driver were then arrested.

The Buffalo City Court dismissed the charge against Butler, and the state appealed to the Erie County Court, which affirmed the conviction of Uplinger in the companion case and reversed the dismissal of Butler. On appeal, the New York Court of Appeals ruled 6 to 1 that section 240.35 was unconstitutional because the statute, without requiring a showing of annoyance, prohibited the public solicitation of an act which could be legally performed in private.

BACKGROUND AND SIGNIFICANCE

This case represents a test of the police power of the states to regulate certain kinds of speech, anticipatory to permissible conduct, against the free speech and association rights of people to engage in deviate sexual activity.

The wording of the statute is also alleged to violate certain aspects of the due process and equal protection clauses of the Fourteenth Amendment. Thus the police power of the state collides here with the assertion of individual rights to engage in private, consensual sexual behavior between adults.

However, the case is not merely a test of state power versus individual rights. For the Court to sustain the New York police power in these cases, it may very well be required to rule on the right of homosexuals to choose their sexual preference — even where that preference is denominated as "deviate" by a state statute. On the other hand, for the Court to sustain Uplinger and Butler, it will have to deal with the power of the states to regulate certain anticipatory activity. Thus, the Court will be required to undertake a certain amount of balancing to reach a decision in these cases.

The concept of privacy is woven throughout the briefs of both sides. Curiously, both sides argue the protection of privacy is the basis for their legal positions. The state claims that the privacy concept protects the freedom of people to walk down the street or wait for a bus without having to deal with the harassment or annoyance of being propositioned to engage in a deviate sexual act. Uplinger and Butler, on the other hand, claim that the privacy concept protects their right to discreetly chose another consenting adult as their sexual partner, as well as their right to engage in the sexual conduct of their choice in private.

The present Court has not been particularly receptive to claims of privacy, but in this case it may have to recognize the privacy claims of at least one of the litigants. As with the power versus rights controversy, the Court may eventually be required to balance the respective privacy claims against each other to reach a decision in these cases.

Central to the arguments of both sides is the New York court of Appeals decision in *People v. Onofre*. The state seeks to distinguish between public anticipatory acts and the private activity in *Onofre*. Uplinger and Butler argue that since *Onofre* protects their right to engage in "deviate" sexual activity in private with a consenting adult, *Onofre* must also protect their discreet solicitation for such a permissible act even if such solicitation occurs in public. They imply a fear that the Court may overturn the ruling in *Onofre*, which essentially decriminalized sexually deviate acts between mutually consenting adults in private.

It seems unlikely that the Court will uphold *Onofre*. More likely, it will either distinguish the present case from the *Onofre* facts by emphasizing the public character of the conduct at issue here, or rule that a state can prohibit the kind of conduct which the New York Court of Appeals found to be constitutionally permissible in *Onofre*.

ARGUMENTS

For the State of New York

1. The state has a compelling interest in regulating deviate sexual acts.
2. The state has a compelling interest in controlling the indiscriminate solicitation of sexually deviate acts in public streets because it is an affront to the moral sensibilities of most members of the public.
3. The state has a compelling interest in the protection of minors from sexual exploitation.
4. The state has a compelling interest in regulating activities which constitute a public nuisance when such nuisance damages both the character of a residential neighborhood and the viability of local commercial interests.
5. The New York statute is a valid exercise of the state's police power because it is tailored to prohibit annoying conduct which occurs in public. The statute is sufficiently specific that it avoids problems of vagueness, overbreadth and underinclusiveness.

For Robert Uplinger and Susan Butler

1. The statute as applied to Uplinger violates his right of free speech under the First Amendment. He was prosecuted solely for his words. No illegal sex act ever took place. One cannot be prosecuted for mere words which do not fit within any recognized exception to the First Amendment such as "fighting words," and "obscenity."
2. The statute chills the First Amendment right of association because it proscribes solicitation for conduct which is permissible under the *Onofre* case.
3. The statutory scheme is underinclusive and violates equal protection standards because it does not prohibit the solicitation of conventional sexual activity. The law also discriminates against homosexuals without furthering any kind of compelling state interest.
4. The statutory scheme suffers from vagueness and overbreadth because it fails to define what type of activity falls within the category of "deviate" acts, thereby leaving the individual to guess at his or her peril whether a particular act is illegal.
5. The fundamental rights of privacy and the First Amendment clearly outweigh any minimal, indeed nonexistent, state interests. This is especially true where the state proscribes conduct which it is not required to show is offensive in any way. Thus, the state seeks to prohibit conduct merely for the sake of prohibiting the conduct.

AMICUS ARGUMENTS

The Attorney General of New York argues that section 240.35(3) is unconstitutional as applied because it violates the rights to privacy, free speech and equal protection. Nevertheless, the attorney general urges that

the New York Court of Appeals erred in finding the statute facially invalid. Instead, he urges that the cases be remanded to the New York Court of Appeals with directions to dismiss the prosecutions against Uplinger and Butler, but permit future prosecutions against persons involving minors in such solicitations, since the present statute could be constitutionally applied against such people.

Additional amici curiae briefs were filed on behalf of the Center for Constitutional Rights, National Lawyers Guild, American Psychological Association, American Psychiatric Association, American Public Health Association, American Association for Personal Privacy, The Sex Information and Education Council of the United States, the Coalition on Sexuality and Disability, the Society for the Scientific Study of Sex and the Lambda Legal Defense and Education Fund. Each of these groups supported Uplinger and Butler. These briefs generally point to the discrimination against homosexuals which appears to underlie the New York statutory scheme and the significant intrusion upon privacy rights which the statute seems to encourage.

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