STAFF ANALYSIS: ACA 51 (Cory), as introduced March 13, 1972

SUBJECT: Adds privacy to inalienable rights....makes technical changes

SUMMARY: Amends existing Art. I (Declaration of Rights) to include the pursuing and obtaining "privacy" among the State Constitution's inalienable rights.

Changes masculine words such as "he", "his", and "males" to persons and adds the word Assemblywomen to the existing sections where the word "Assemblymen" is presently used.

BACKGROUND: The right to privacy does not exist per se in the Federal Constitution or any other state Constitutions....the courts, however, have articulated a right to be free from certain kinds of intrusion of governmental acts...the Courts' work in the privacy field is defining the right solely by the wrong...(libel, unlawful search and seizure, telephone tapping, fair credit reporting act, etc.).

Author carried a similar measure last session as a companion to his personal data bill, regulating use of and access of personal data by public agencies.

FEDERAL DECISIONS: Best known of so called "right to privacy" cases is Griswold v. Conn. 381 U.S. 479 (1965), in which the Supreme Court struck down Connecticut's anti-contraceptive statue on ground that it violated a couple's right to privacy...the court articulated that the fear of governmental voyeurism was thought to be almost as destructive of personality as would be a physical intrusion. However, to date no definition has been formulated of a constitutional right of privacy...it appears, that the court draws from the entire Bill of Rights and various amendments, but it is not clear from case law who is protected and from what.

COMMENT:

"Persons," according to sec. 17 of Code of Civil Procedure, includes a corporation as well as a natural person. Does the author wish to extend inalienable rights to the corporate person?

Testimony of Cheriel Moench Jensen
on ACA 51 before the Assembly Constitutional Amendments Committee
April 24, 1972

Much of the following testimony was prepared by Mary Dunlap, attorney from Bolt Hall, who has the flu and could not be here to present it herself.

There are two basic changes in Assembly Constitutional Amendment No. 51 which will be dealt with separately and then their relationship to each other and their timeliness will be described.

CHANGE THE TERM "MEN" TO "PERSONS" AND CHANGE THE TERM "ASSEMBLYMEN" TO "ASSEMBLYMEN AND ASSEMBLYWOMEN"

Webster defines "Man:...) 1a) a human being; especially an adult male human..." (emphasis in original)

The ambiguity that accompanies the use of the term "men" is incorporated in our Constitution as presently worded. This ambiguity is inconsistent with the Constitutional right of equal protection. The California Supreme Court (Sail'er Inn, Inc. v. Kirby 485 P. 2d 529 (1971) ruled that sex was a "suspect" classification. The state has never shown a compelling interest to so classify. The United States Supreme Court (Reed v. Reed 30 L Ed 2d 225) ruled that, "To give mandatory preference to members of one sex over members of the other...is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment..."

Therefore, whether the Equal Rights Amendment is ratified or not, the equal protection clause partially covers

this area and the change we propose would bring the California Constitution up to date.

There is no gender clause in either the California Constitution or the United States Constitution. Therefore, any reference to a particular sex does not automatically mean the other sex as well. We can be reasonably certain that those who drafted the California Constitution did not intend this Article I, Section 1 to include women. For example, the ownership and possession of property protections in Article I, Section 1 were never read to expand the common law rights of women with respect to property. Such rights were extremely limited before the passage of the Married Women's Property Acts in this country. Even after these acts were passed, the state legislature continued to pass laws that restricted and disenfranchised women. These laws were never found unconstitutional under Article I, Section 1.

It was not until 1875 that even the United States Court recognized that women were "persons" and that they had always been citizens but in this same case (Minor v. Happersett 21 Wall 162, 22 L Ed 627 (1874 U.S.) the court ruled that the fact of their citizenship did not entitle women, by virtue of the privileges and immunities clause to the right to vote.

An example of the exclusionary treatment of women is:

> Article X, Section 1 of the California Constitution which allows for punishment, treatment, supervision, custody and care of females in a manner and under circumstances different from men similarly convicted. Such differential treatment effects safety, happiness, freedom and independence, life and liberty.*

This shows that the framers did mean only men because men were the only citizens.

Examples of private actions excluding women from these rights include but are not limited to:

> A woman who has been refused admission to a hospital because her husband cannot sign the permission form does not have the right to obtain safety or defend her life. This is common practice.
>
> A woman who has been denied automobile insurance because of her husbands bad driving record has been denied the entire list of rights under the Section under discussion.
>
> A married woman who is not allowed to purchase stock without her husbands consent has been denied the right to acquire and protect property.

While it would be more comfortable and efficient to rely upon the good faith of government to preserve and protect these basic rights in Article I, Section 1 for all persons, the history of the legal status for women proves that course to be unsafe.

The change of the term "men" to "persons" is easily accomplished but is not, as a function of that ease, a petty matter. Such a change would provide the theoretical basis

upon which fundamental rights in law and practice could be extended to all persons. To perpetuate the present wording on this point would afford leeway to those who, now and in the future, may misunderstand or misrepresent the relation of women to fundamental rights. Thus it is a miniscule change, but a crucial one.

May it also be mentioned before proceeding to the next point that the Equal Rights Amendment refers only to rights under the law. As we have seen there are many practices involving fundamental rights that fall outside of the scope of the law but are in some ways more important to the individual such as the right to defend ones own life by being able to sign into a hospital. Changing this part of the Constitution could have a persuasive effect in those areas.

"PURSUING AND OBTAINING ... PRIVACY"--ADDED TO ARTICLE I, SECTION 1.

The right to pursue and obtain privacy is not spelled out in either the state or the federal constitutions but has a firm basis as established by the United States Supreme Court.

Webster defines "Privacy...) 1) the quality or condition of being private; withdrawal from public view or company; seclusion. 2) secrecy."

Webster defines "Private... belonging to oneself, not public or of the state..."

The Supreme Court has defined privacy as a basic right and has furnished us with more complete definitions. To quote Justice Douglas:

> "specific guarentees in the Bill of Rights have penumbras, formed by emanations from those guarentees that give them life and substance. Various guarentees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incriminating Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.'"
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> "The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L Ed 746, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'"

Marriage is described in Griswold v. Connecticut as containing a right of privacy older than the Bill of Rights...". Even more specifically "the constitutional right of privacy inheres in the individual, not in the marital couple." (Above Court Citations from Griswold v. Connecticut 381 U.S. 479, 85 S. Ct. 1678, 14 L Ed 2d 510.)

The Court in Stanley v. Georgia 394 U.S. 564, 89 S. Ct. 1247 helps to further define the right of privacy:

> "Also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

> "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 man."

The Courts have broadly defined the right of privacy. No right can be interpreted as absolute, however. We have the well established right to freedom of speech but that right does not allow us to slander other persons, to yell fire in a crowded theater or to disturb the peace because these actions would, in the balancing test, infringe on rights possessed by others. There would have to be two tests used by the legislature and the courts in defining this right to pursue and obtain privacy. The first would be a balancing test and the second would be the test of "compelling interest" that the state might have. The "Government is instituted for the protection, security and benefit of the people" (emphasis added) and therefore enumerating the people's right to pursue and obtain privacy would not only not take away any powers the government now has, it would be carrying out the responsibility set forth in Article I, Section 2 of the California Constitution.

THE RELATIONSHIP OF CHANGING "MEN" TO "PERSONS" AND OF ADDING THE RIGHT TO PURSUE AND OBTAIN PRIVACY

With the pending passage of the Equal Rights Amendment many persons have been worried that some basic aspects of privacy would be jeopardized because the Separate-But-Equal doctrine was abandoned in Brown v. Board of Education 347 U.S. 483 (1954). Although the Supreme Court has held that persons have a right to privacy the people charged with carrying out the law are not necessarily familiar with the courts decisions. It is important then that the right to pursue and obtain privacy be understood by the people lest individuals take it upon themselves to deprive others of privacy in the name of equality.

> "One important part of the right of privacy is to be free from official coersion in sexual relations. This would have a bearing on the operation of some aspects of the Equal Rights Amendment. Thus, under current mores, disrobing in front of the other sex is usually associated with sexual relationships. Hence the right of privacy would justify police practices by which a search involving the removal of clothing would be performed only by a police officer of the same sex as the person searched. Similarly the right of privacy would permit the separation of the sexes in public rest rooms, segregation by sex in sleeping quarters in prisons or similar public institutions, and appropriate segregation of living conditions in the armed forces." (Yale Law Journal, Vol. 80:871, 1971)

Such facilities of course would have to be equal in both quality and convenience.

Even more important than facilities and official treatment is the fact that some people think that the laws

prohibiting various types of sexual assault are couched in terms which would make them unconstitutional. With the right to pursue and obtain privacy spelled out these criminal statues would have a firmer basis on which to be revised on non-sexist terms and would be more likely to stand if they were not revised in time.

Because the principles herein described carry such importance for at least half of the people we hope this committee will not treat them lightly.

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*Further examples of the exclusionary treatment of women are:

> A married woman who cannot control her half of the community property within a marriage cannot protect her property. The United States Supreme Court has ruled that she is liable for the tax on such property even though she may lack any control of it even to the extent of knowledge about its existence.
>
> A married woman who cannot retain her domicle is not able to pursue and obtain safety and happiness and more importantly may be disenfranchised altogether in such a way that she has no choice of the law which effects her or voice in her government.
>
> A married woman who has been denied the right to set up a business separate from her husband and has therefore been denied the right to earn a living the way she wishes has been denied the right to acquire property.
>
> Once a married woman has deposited her own pay check into the joint bank account her husband becomes the sole manager of such money. Thereby the laws have denied her the right to protect her half of such community property.
>
> The requirement that females have a higher grade point average than males to attend such institutions such as Lowell High School in San Francisco denies to them ultimately the right to acquire property as such action may have a substantial effect on future education and employment.

AMENDMENTS TO ASSEMBLY CONSTITUTIONAL AMENDMENT NO. 51

AMENDMENT 1

In line 4 of the title of the printed measure, strike out ", Sections 2 and 6 of Article IV, and", and in line 5 strike out "Section 11 of Article IX".

AMENDMENT 2

On page 1, strike out lines 7 and 8 and insert:

Constitution of the state be amended by amending Section 1 of Article 1 thereof to read:

AMENDMENT 3

On page 2, strike out lines 2 to 40, inclusive, on page 3, strike out lines 1 to 40, inclusive, and on page 4, strike out lines 1 to 18, inclusive.

A/C C.A.
ACA 51
1972