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Mr. Rob Cole
The Advocate
Box 74695
Los Angeles, CA 90004

Dear Rob,

Enclosed is my effort at a first article on law reform for the Advocate. Let me know what you think of it. I've tried to make it readable and understandable for the layman, but find it difficult to assess how successful I've been.

If you consider it publishable, I hope you'll do your dead-level best to get in the very next issue of the Advocate. Things are breaking fast in this area, and if gays across the country are to be galvanized into doing something to further their cause, it will have to be quick!

I would appreciate your publishing a little squib at the top or bottom of the article, just stating that I am a professor of law at the University of New Mexico and am co-chairman of the National Committee for Sexual Civil Liberties, which is an outgrowth of the former NACHO Legal Committee. You might also state that this is the first in a series of articles dealing with law reform.

By the way, if you don't like it, feel free to send it back. I won't be offended. This is my first crack at writing for a newspaper, so I don't expect to be very good.

Cordially,

Walter

Walter Barnett

WHAT YOU CAN DO ABOUT LAW REFORM--NOW!

By WALTER BARNETT

Ending discrimination against gay people in America is a gigantic task--one that will doubtless take years even under relatively favorable conditions. The logical first step is reform of the criminal laws, because they are the means by which American society has branded homosexuals as criminals. As long as these laws persist in their present form, little can be accomplished towards providing job security, nondiscrimination in hiring and housing, and the like. So how does one go about getting these laws changed?

The two types of criminal laws that discriminate against gays are the laws penalizing deviate sexual relations between consenting adults in private (oral-genital and anal-genital contacts, at least, are covered by these laws, which are generally referred to as the sodomy laws), and those penalizing solicitation for such relations. Although many gays are arrested and prosecuted under statutes of the "public lewdness" variety, these are not discriminatory on their face and nobody can reasonably expect them to be repealed or substantially modified.

The laws in question are state, not federal, laws. The federal government's criminal jurisdiction extends only to federal enclaves and to areas of activity--such as interstate commerce--over which the Constitution grants it regulatory power. Until now, no federal sodomy statute has existed, because Congress has provided that the criminal laws to be applied in federal enclaves are to be those of the statesin which they are situated. For example, crimes committed in Yosemite National Park are prosecuted by federal

officials in federal courts, but what is made criminal is determined by California law. Of course, the District of Columbia has its own criminal laws, enacted by Congress, and they include a sodomy statute; and the same goes for the Uniform Code of Military Justice. This assimilation of federal territory to that of the state in which it is located, for purposes of general criminal law, may not last much longer. The National Commission on Reform of Federal Criminal Laws, in its final report issued just this January, has formulated and recommended adoption of a complete federal criminal code, to be operative in these federal territories. Happily, this proposed code would not make criminal any sexual conduct between consenting adults in private, and, though it contains a provision against solicitation, the provision is applicable to heterosexuals and homosexuals alike and contains a built-in protection against police abuse. The protection is simple; it consists in saying that only a private person can be the complaining witness in a prosecution for sexual solicitation. Thus, police entrapment and enticement are barred. Understandably, sexual activity occurring in places where it might be viewed by others who would be affronted or alarmed is made criminal, again without any distinction between heterosexual and homosexual conduct. These provisions are about the best that anyone can hope for: Deviate sexual conduct becomes licit except where minors, force or imposition, or a public place are involved; and sexual solicitation is a basis for arrest and prosecution only at the initiative of an offended citizen, not a law enforcement officer. The big problem is how to get state laws to conform to this model.

There are two avenues of change, one via the courts, the other via the legislatures. To bring about change in a state law through

the courts, one must attack it as unconstitutional. The state courts may strike down state laws under either the federal or the state constitution; a federal court generally takes cognizance only of challenges under the federal Constitution. Throughout American history, no sodomy statute has ever been held unconstitutional by the highest appellate court of a state, though a number of such attacks have been mounted over the years. In 1969, this solid front presented by the state courts was partially breached by the supreme court of Alaska, which voided the phrase "crime against nature" in the Alaska sodomy statute as unconstitutionally vague. This was a pyrrhic victory because the Alaska statute is still quite viable even without that phrase.

In 1970, in the Buchanan case, a federal court for the first time held a state sodomy statute--that of Texas--totally void. The ground was that the statute was so broadly worded as to bring within its net deviate conduct engaged in by married couples, and the Supreme Court had previously held that no state could subject to criminal regulation the intimacies of the marriage bed. Since Buchanan, two other federal courts have voiced approval of its reasoning, but the Supreme Court has done nothing with it, though the appeal from it has been on file with the Court since last June. It now appears likely that the Supreme Court will refuse to pass on the validity of the Texas sodomy law, and will throw the Buchanan case out of the federal courts. The reasons are complex, but basically they have nothing to do with the merit or demerit of the Texas law. Instead, they relate to the ways in which state criminal laws can be challenged in federal courts. The Supreme Court, in a cluster of opinions handed down at the end of February in other cases, severely limited the circumstances under which it would permit state laws to be challenged in the federal courts in the way in which the Texas sodomy statute was challenged in the Buchanan case. And from the looks of those opinions, the Buchanan case falls outside the limits.

I do not mean to imply that constitutional challenges to the sodomy laws in the courts have now become worthless, only that the prospects for a successful challenge are now less promising. Only a decision of the Supreme Court could force law reform all across America, and the Buchanan case now appears unlikely to be the vehicle for such a decision. Future challenges probably can now get to the Supreme Court only by direct appeal from a state

appellate decision affirming a conviction under the statute, or by way of a federal habeas corpus proceeding initiated by a defendant after his conviction has been sustained in the state courts. The trouble with challenges via these routes is that almost nobody is ever convicted of consensual sodomy with another adult in private. And making sodomy with minors, by force, or in public criminal is doubtless constitutional. So how can a defendant convicted of sodomy in these circumstances convince a court to hold the law unconstitutional because of its impermissible applicability to other circumstances, not present in his case? Anyone can see how reluctant judges would be to let off a defendant convicted of sodomy with a child, just because the law also appears to make his act criminal if committed with an adult! The other problem with constitutional challenges in the courts is that they all have to argue from analogy to recent decisions of the Supreme Court which announce rather novel constitutional doctrines in terms that are none too clear. The argument on which the Buchanan case rested was a compelling analogy; if a state cannot constitutionally prohibit married couples from using contraceptives, as the Supreme Court had held in Griswold v. Connecticut in 1965, then it is reasonably certain that it can't prohibit them from engaging in oral-genital or anal-genital contact either. But to have a sodomy statute held unconstitutional on this basis is small comfort to gay people, because a state could promptly reenact its statute to exclude married couples from its scope, and homosexuals would be no better off than they were before. Sad to say, the other constitutional arguments against the sodomy laws are based on even more remote analogies than this one, so whether the Supreme Court, or any court, would buy those arguments is anybody's guess.

How about the prospects for law reform via the legislative route? Well, obviously, any state legislature has the power to remake its laws along more just and rational lines. Will it do so? I suppose everyone knows that the laws were reformed in Illinois along exemplary lines in that state's general penal code revision of 1961. The same thing happened in Connecticut in 1969, though the new Connecticut penal code embodying the reforms is not scheduled to go into effect until October 1st of this year. Thus, two state legislatures have seen fit to reform their laws, so that deviate sexual conduct is a crime only if it occurs with minors (the age of consent being 18 in Illinois; 16, in Connecticut), by force or imposition, or in public. Neither reform makes sexual solicitation a crime, whether heterosexual or homosexual, unless it involves sex for hire (the new codes of both states making no distinction between heterosexual and homosexual prostitution). No opposition to the reform was voiced in either legislature. So if Illinois and Connecticut can do it, why can't it be done elsewhere?

The critical fact to note about what happened in these two states is this: The reform was enacted as part and parcel of a general revision of the criminal law. To some extent at least, it thus got buried under other questions of greater import, and probably slipped through more easily than it would have if presented in a separate bill by itself. The chances, then, of law reform via the legislative route may thus be much enhanced if the changes can be proposed as part of a general modernization and rationalization of the criminal laws of the state.

The important thing for gay people to know is that a vast number of states are right now engaged in this very project of

general penal law revision, so the chances of law reform by means of the legislatures are better now than they have ever been before or are likely to be again in the foreseeable future. And if homosexuals are ever to move to protect their rights as human beings, they should move now. If you sit on your hands and do nothing, this golden opportunity to strike the criminal stigma from your way of life may be missed!!!

Here is the picture. The movement toward general penal law revision was initiated by the efforts of the American Law Institute to draft a model penal code. These efforts began in the early 1950s, and the more-or-less final draft was published in 1962. The Illinois reform of 1961 drew heavily from this Model Penal Code. Since 1961, several other states besides Connecticut have enacted new criminal codes: New Mexico in 1963, New York and Minnesota in 1967, Georgia in 1969, and Kansas in 1970 (these dates are those on which the sex provisions of the codes became effective). The New York revision committee recommended outright repeal of consensual sodomy between adults in private, but the legislature would not agree; so under the new code in New York, it remains a misdemeanor carrying a maximum sentence of three months in jail. A similar effort for repeal had been made in the New Mexico legislature in 1961 but failed, ostensibly because of opposition from officials of the Roman Catholic Church. Thus, in New Mexico, consensual sodomy between adults in private remains a felony with a maximum ten-year sentence. In the Minnesota and Kansas revisions, consensual sodomy between adults was reduced to a misdemeanor, with a maximum sentence of one year in jail in Minnesota, and six months in Kansas. Thus, both these revisions appear to have followed the lead of New York, dropping felony penalties but not repealing the offense completely. The

New York law excludes married couples from its coverage, so they commit no crime there by engaging in sodomy; Kansas excludes both married couples and all unmarried heterosexual contacts; and Minnesota provides no exclusions at all. The Georgia revision made no effort at reform. If anything, it was a regression to greater barbarity. The offense was redefined so as to make its coverage more clear in general, and to include lesbian acts (which the old law had not covered); and the penalty was revised to allow a maximum sentence of twenty years in all cases, where the old law had not permitted more than ten years for the first offense between consenting adults! Regarding solicitation, the new penal code of New York contains a provision of the most objectionable type, making it a crime for a person to loiter in any public place for the purpose of soliciting deviate sexual relations. The New Mexico code has no provision at all on solicitation. The Minnesota code makes solicitation for deviate sexual relations a crime only if it involves prostitution. Kansas and Georgia have added provisions against solicitation where none existed before, Georgia's specifically covering "solicitation for sodomy" and Kansas' penalizing loitering in a public place "with intent to solicit for immoral purposes". This is most unfortunate, because new possibilities for arrests and harassment of gays in Kansas and Georgia have thus been created.

In one other state a substantial reform has taken place, outside any general penal law revision. This is Utah. In 1969, its legislature passed a law reducing consensual sodomy between adults (that is, persons 18 or over) from a felony carrying a maximum sentence of twenty years, to a misdeameanor carrying a maximum jail term of six months.

Of the remaining states, 28 are in various stages of coming up with new criminal codes. In this article, I shall mention only those where enactment of the new code is possible, if not probable, this year. These are the states where action is urgently needed on behalf of gay people, now. They are, from west to east, Hawaii, Oregon, Idaho, Montana, Colorado, Texas, Michigan, Pennsylvania, Delaware, Vermont, and New Hampshire. In addition, Puerto Rico is contemplating adoption of a new criminal code this year, but copies of it in English are not yet available.

The worst news is Montana. Its proposed new code, in section 94-5-505, would retain consensual deviate acts as a felony with a maximum penalty of five years imprisonment, but only where homosexual conduct (and bestiality--acts with animals) are concerned. Under present Montana law such conduct is punishable by imprisonment for a minimum of five years and a maximum of life! The commentary on the new code blandly states that the present penalty is a little bit too harsh! The only solicitation provision in the new code is one on prostitution (which covers both heterosexuals and homosexuals), and is therefore difficult to find fault with.

Texas, New Hampshire and Delaware are proposing the retention of consensual sodomy as a crime, but reducing it to a misdemeanor. In the Texas revision, all heterosexual contacts, married or unmarried, and bestiality are excluded from coverage, so only homosexual conduct remains criminal. Section 21.06 of the proposed Texas code makes it a Class A misdemeanor, which carries a maximum sentence of one year in jail. The Texas code has no provision against solicitation, except one involving prostitution (and prostitution covers both homosexual and heterosexual conduct). The

proposed New Hampshire section on deviate sexual relations (577:2) would carry the same penalty as Texas', but includes both bestiality and unmarried heterosexual contacts within its scope; only deviate sexual relations between husband and wife are excluded. The New Hampshire provision against solicitation, again, covers only prostitution, homosexual as well as heterosexual. The proposed Delaware code (in section 433) would retain consensual sodomy as a Class B misdemeanor, which carries a maximum sentence of three months in jail; like the Texas code, however, Delaware's would make criminal only homosexual contacts. Section 806 of the Delaware code would make a "violation" out of loitering in a public place for the purpose of engaging or soliciting another person to engage in sexual intercourse or deviate sexual intercourse. Thus, homosexual solicitation in Delaware would be subject to a fine up to $250 ($500 on second offense), but not to any jail or prison term. This, however, as in Kansas and Georgia, would create a potential for harassing gays that did not exist before, because present Delaware law does not make solicitation criminal.

In Pennsylvania, the proposed new code is somewhat noncommital in its recommendations on consensual sodomy. The basic provision (section 1203) covers only acts by force or other imposition, or with minors under 15. Then two alternatives are suggested to the legislature as possible additions to this section: One would make all consensual acts in other circumstances a misdemeanor of the 2nd degree; while the other would do likewise except where the partners are both over 21, thus excluding from criminality acts between adults.

The legislature is, in effect, offered a choice of either of these two alternatives, or neither; it is left to make up its own mind. As for solicitation, the Pennsylvania code unfortunately copies the provision of the Model Penal Code, which makes a misdemeanor out of loitering in a public place for the purpose of soliciting deviate sexual relations. This provision (section 2503) is objectionable because it makes criminal homosexual, but not heterosexual, solicitation, and because it contains no protection against police entrapment and enticement.

The proposed codes of Oregon and Idaho would legalize all deviate sexual relations between adults (the age of consent would be 18 in Oregon; 16, in Idaho). Both, however, contain the same objectionable provision against homosexual solicitation as Pennsylvania's. (These provisions are section 119 in the Oregon code, and section 18-2103 in the Idaho code.) Unlike the situation in Pennsylvania, enactment of these solicitation laws in Oregon and Idaho would offer opportunities for harassment of gays that did not exist before. Present laws in Oregon and Idaho contain no provisions directed against homosexual solicitation, while Pennsylvania's present laws make it a felony!

In [redacted] Hawaii, Vermont, Michigan, and Colorado, the proposed new codes would effect outright repeal of consensual deviate sex between adults in private. The age of consent would be [redacted] 14 in Hawaii, 16 in Vermont, 16 in Michigan, and 16 in Colorado. None of these proposed codes contains any provision against homosexual solicitation, unless incidental to prostitution, except Michigan. The proposed Michigan code, in section 5540 (1)(c) makes it a crime to loiter or remain in a public place for the purpose of engaging or soliciting another to engage in

prostitution, deviate sexual intercourse or other sexual behavior of a deviate nature. Again, this is a retrogression, as present Michigan law contains no provision against homosexual solicitation. Hawaii and Colorado, on the other hand, do have existing laws against solicitation, which would be repealed.

It is difficult to say what the chances are for passage of any of these codes this year. The best bets for passage are Oregon, Idaho, New Hampshire, Colorado, Michigan, and possibly Pennsylvania and Delaware. The latter three codes have had a substantial airing already; in other words, the drafts have been out for several years for study by the state bar and judges and other officials involved in the criminal process. (The house hearings on the Michigan code have already been completed.) No substantial problem appears to exist in the other four states. In Texas and Hawaii, however, latest reports have it that the codes are running into rough sledding in law-and-order-minded legislatures. In Vermont, the revisers appear to be planning more extended study of the proposed code before pushing for its final adoption. Actually, Vermont's code was enacted tentatively last year, to go into force this year if the legislature passes a joint resolution to that effect. No word is available on the situation in Montana.

The big question is--what can you do about it all? This will be explored in more detail in the next article in this series. But basically the crux of the matter is that if you want to see the laws changed, you have to be willing to do something! And that something will involve writing to and visiting your legislators. If you're unwilling to do this, then read no further. The National Committee for Sexual Civil Liberties can exert very little influence in

this arena. Legislators incline their ears to constituents who can vote, not to out-of-state experts. The latter can provide you with information and arguments, even drafting services if necessary, but YOU must be the spokesmen for reform. If an effort is to be made to liberalize the provisions of these proposed codes that affect gays unjustly, YOU must make it. And it must not be assumed that those provisions which are already as liberal as one could hope for will necessarily be enacted. If nobody is on hand to "watch the pot", that is, to take an active interest in bird-dogging these provisions through, even they may get scuttled.

(To be continued)