DISABILITY, SEXUALITY AND THE LAW
Considerations and Prospects June 1981

[Note: References herein to the problem are based on considerations of New York law. Similar considerations arise under other states' laws, with variations which cannot be considered in detail. Further information of a general nature can be obtained through the speaker or through counsel in the conference participant's local jurisdictions.]

The purpose of this paper is to present for your consideration, in a general form only, the various legal considerations which may affect the health or counselling worker's involvement in the patient's sexuality concerns. It is not intended this afternoon to provide a full compendium of possible legal ramifications. Rather, the discussion is focused on the overlapping concerns of workers with the disabled, on the one hand, and lawyers and other legal personnel concerned with society's efforts to regulate through the law the consensual sexual activities of the general citizenry, on the other. The discussion is hopefully going to raise issues of concern in your minds and suggest possible areas of further concern and possible action.

It is assumed as a premise that in working with the disabled, the health worker (intended to cover all aspects of the helping professions which may be involved in counselling of patients or disabled persons as to their sexuality) is dealing with sexual persons. Society would probably be much more comfortable assuming that disabled people assumed a role of celibacy. Sexuality is culturally embarrassing to the western world. Despite the trend to greater sexual freedom -- the sexual revolution -- a strong overlay of earlier times remains, still reflected, for example, in the law's assumption that even consensual sex acts should be regulated, at least to the extent that they are not generally approved by the majority of the public. Overt eroticism remains, to a greater or lesser degree, a taboo in the general population. I assume and believe it is especially subject to a taboo with respect to disabled people as, to a lesser degree, it is still with children and the elderly.

The second observation, as a premise, is that the criminal law is a broad-brush, somewhat clumsy method of controlling conduct. Any criminal statute is aimed at the general public reality apparent to the legislator (or to the general reality within the particular group to which the statute is directed, as may be appropriate). With the exception of statutes defining as forcible sex acts with persons who have mental disabilities (further mention below), however, sex regulation by the criminal law is generally not aimed at the target group of the disabled. The impact of general sex statutes on the disabled and counsellors of the disabled, however, may be great.

Third, it may be observed that even if conduct would be technically within the statutory prohibitions, the possibility exists that it would not be generally enforced, certainly not with the degree of enthusiasm that would generally apply elsewhere, where the violation was at the hands of the disabled and their counsellors and the violation was within a factual context that would evoke sympathy from a jury. Nonetheless, the problem of the health worker is aiding disabled people is that their conduct, to the extent it might contravene the applicable criminal statute, must be viewed as potentially vulnerable to prosecution, embarrassment or even civil suit. If, for example, a health worker, in aid of the disabled person, masturbates that person at the request of the individual or as part of a therapy procedure, is there a danger that the health worker may be guilty of some sort of sexual abuse or other misconduct statute?

> [Note: Under New York Law (Penal Law §130.55 et seq.) subjecting another person to sexual contact "without the latter's consent" is a basis for sexual abuse charges. The fact issue may always exist whether consent was given. If the disabled person was under age or was mentally or physically incapacitated to a sufficient degree, consent may be found to be absent as a matter of law. Probably, New York law would pose little hazard here, provided consent was clearly present from an adult, capable of full range of communication. It is uncertain at what point a difficult problem would arise short of that. Other state's laws may be much more restrictive.]

Even if it be assumed that conduct might technically come under the statute but that the prosecutor would not wish to pursue that remedy (not always a safe assumption; consider the political situation in your locality), other ramifications may follow:

(a) The "ethics" or appropriateness of the health worker's conduct may be argued out on a heavily judgmental basis, inflamed by the assumed illegality of the conduct.

(b) Certain courts will find a basis for civil liability in private law suits based upon a finding that the conduct was in violation of criminal statutes, therefore wrong, and that the courts should fashion a remedy -- money damages -- to protect the harmed party.

Fourth, we assume that whatever conduct is talked about was, in the good faith view of the health worker, appropriate for the best interests of the disabled person and necessary if the health worker were to fulfill his/her mission of service. Nowhere is this more pointed than where the attacked conduct was that of counselling and advising -- simply speaking with -- the disabled person regarding his or her primary concern. Assume, for example, the following facts (again, referring to New York law and, for the moment, ignoring the fact that we have recently been able to eliminate the consensual sodomy statute through court action):

Your disabled client has suffered an injury or birth defect which makes majority sex forms difficult or impossible. A war injury, for example, has created genital damage in a male client. Alternatively, your disabled client, in addition to the problems of his physical disability, finds himself totally, psychologically oriented as a gay person. It is problem enough for you to assist him/her in dealing with the physical problem; progress in helping him/her in adjusting to that successfully is stymied until you can assist him/her in dealing with his/her sexual frustrations or confusion. As a health worker committed to counselling only, what do you do?

New York law presents you with a number of problems.

Prior to judicial repeal (see Appendix II), Penal Law section 130.38 (see Appendix I) makes the commission of any act of consensual sodomy -- one alternative sexual form of expression for the physically disabled and the only acceptable mode of expression to the gay disabled -- a crime, punishable by fine and imprisonment of three months. (Note: In some states where similar crimes remain on the books, the punishment can be much more severe -- for example, a felony, punishable by imprisonment for up to ten years.) If the health worker counsels the patient in a way to encourage this mode of behavior, Penal Law section 20.00 (see Appendix I), the health worker may also be guilty of the same crime. This could be the case under New York law even if the prosecutor saw fit not to proceed against the disabled person or even if the disabled person was, for reasons of incapacity of some sort, not guilty of the offense. (See Penal Law section 20.05, Appendix I.)

In other words, by applying general standards adopted by the Legislature with fully capable, general members of the public in mind but with no expressed exceptions for the physically disabled to the physically disabled, a rigid and unbending application of the statute would make the good faith efforts of the health professional arguably criminal. On the one hand, therefore, the danger is either that the health worker will not respond to the real and genuine needs of the disabled client or, on the other hand, that such a response will be given which will be construed in a manner detrimental to the health worker, either in criminal or civil court or in the arena of public or professional opinion.

[Note: The problem is posed in its most unavoidable aspect -- where counselling is all that is involved as opposed to sexual contact between the health worker and the disabled patient and where the resulting conduct of the disabled person is consensual in nature. Special considerations would be present where the resulting conduct is either actually or constructively forcible,

with a much reduced practical likelihood that there would be prosecution of the health worker absent indication that forcible sex was the type of sex counselled. However, note the dangers of sex involving persons who may, as special wards or objects of protection of the state (mentally retarded persons, minors, etc.), be legally incapable of giving consent. New York Penal Law section 130.40 defines as sodomy third degree, a felony, sodomy involving one "who is incapable of consent by reason of some factor other than being less than seventeen years old", while section 130.00 and section 130.05 define with that character anyone who is "mentally defective" or "mentally incapacitated". See Appendix I.]

My ultimate premise is that health workers share with those in society concerned with the need for elimination of legal restrictions on voluntary sexual behavior between adults, in private, where no overt harm can be perceived from the sexual activity a special interest in procuring the elimination of statutes based in Victorian notions of the assumed role of government to control the private sex lives of citizens. Outside my concern is legal restriction of forcible sex or sex between adults and minors, between non mentally handicapped and the mentally handicapped (although these present specially difficult problems from the point of view of the mentally handicapped, if it be recognized that they too have sexual needs which may not be readily met otherwise). Sexual law reform, a controversial issue under the best of circumstances, becomes a primary priority for any who are concerned for the freedom and healthful adjustment of persons adversely affected by the existing statutory scheme.

The Method and Prospects for Sexual Law Reform

Removal of unduly restrictive statutes governing private consensual sex behavior can be accomplished through legislative repeal or through judicial action. Referring to sodomy statutes, particularly, twenty-six states and the District of Columbia still outlaw consensual acts of sodomy. [Note: "sodomy" here is used in a generic fluid sense as defining generally so-called "deviate" acts of oral or anal sex. Different states use different definitions and words. Originally, it referred solely to anal intercourse. Some states have defined it to

include all forms of non-"normal" sex. Others pick some point between the two extremes. The offense is sometimes referred to as "sodomy", sometimes as the "crime against nature", etc. The common feature in all such statutes in the states which still make the offense unlawful is that the act is unlawful although performed consensually between the parties and generally it does not matter in determining whether the violation has occurred whether it occurred in a public or private place.]

The following jurisdictions continue to have some form of criminal or quasi-criminal prohibition against sodomy:

Alabama	Ala. Code §13A-6-65(a)(3) (Michie 1978)
Arisona	Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (West Supp. 1977)
Arkansas	Ark. Stat. Ann. §41-1813 (1977)
D.C.	D.C. Code Encycl. §22-3502 (West 1973)
Florida	Fla. Stat. Ann. §800.02 (West 1976)
Georgia	Ga. Code Ann. §26-2002 (1977)
Idaho	Idaho Code §18-6605 (Supp. 1978)
Kansas	Kan. Stat. §21-3505 (1974)
Kentucky	Ky. Rev. Stat. §510.100 (1975)
Louisianna	La. Rev. Stat. Ann. §§ 14:89, 14:89.1 (West Supp. 1978)
Maryland	Md. Ann. Code §§ 27-553, 27-554 (Michie Supp. 1977)
Massachusetts	Mass. Ann. Laws, ch. 272, §34 and §35 (Michie 1968)
Michigan	Mich. Comp. Laws §§ 750.158, 750.338, 750.338a (1968)
Minnesota	Minn. Stat. Ann. §609.293 (West Supp. 1978)
Mississippi	Miss. Code Ann. §97-29-59 (1972)
Missouri	Mo. Ann. Stat. §566.090 (Vernon Supp. 1978)
Montana	Mont. Rev. Codes Ann. §94-5-505 (1975)
Nevada	Nev. Rev. Stat. §201.190 (1977)
New Jersey	N.J. Stat. Ann §2A:143-1 (West 1969) [note, declared unconstitutional by lower court decision]
North Carolina	N.C. Gen. Stat. §14-177 (1969)
Oklahoma	Okla. Stat. Ann. tit. 21, §886 (West 1951)
Pennsylvania	18 Pa. Cons. Stat. Ann. §3124 (Purdon 1973) [note, declared unconstituional by Supreme Court 1980]
Rhode Island	R. I. Gen. Laws Ann. §11-10-1 (1969)
South Carolina	S.C. Code Ann. §16-15-120 (1976)
Tennessee	Tenn. Coee Ann. §39-707 (1975)
Texas	Tex. Penal Code Ann. titl. 5, §21.06 (Vernon 1974)
Utah	Utah Code Ann. §76-5-403 (Supp. 1977)
Virginia	Va. Code §18.2-361 (Supp. 1978)
Wisconsin	Six. Stat. Ann. §944.17 (West Supp. 1978)

Note that some of the statutes direct themselves to homosexual acts only, while others (as did New York's; see Appendix I) are concerned with the proscribed sexual contacts whether homosexual or heterosexual).

The attack on the statutes has moved primarily away from reform in the legislatures of the states to the court rooms. Many of the states which continue to have such statutes are not likely to remove the restrictions through legislative action, due to the political situation involved. Success has been experienced in Pennsylvania, New York, New Jersey and a few other states in obtaining declarations of unconstitutionality. The most promising premise which is used is the argument of the violation of the constitutional right of privacy by such statutes under the federal constitution (and, where state courts are willing to find it under state constitutions as well, under those documents also). The constitutional right of privacy is a developing constitutional doctrine which has been more and more prominent since the mid-1960's, covering such areas as the right of married and unmarried persons to have access to birth control information, the right to make fundamental decisions affecting personal choices in various family and non-family contexts, the right to be secure from search of one's home without a warrant and similar considerations.

Those of us who have been concerned about the encroachment of Victorian laws attempting to govern private, consensual sexual conduct between adults, have urged that the right of privacy also extends to private sex acts as well -- particularly so as to invalidate anti-consensual sodomy statutes. The most successful effort to get the courts to state a broad principle in this respect occurred in New York's highest court last December in its ruling in People v. Onofre, 51 N.Y.2d 476 (1980). In a lengthy opinion, the Court stated:

> "In light of these decisions [earlier cases dealing with the right of privacy], protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy . . ., no rational basis appears for excluding from the same protection decisions--such as

> those made by defendants before us--to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting." [See further Appendix II.]

An attempt was made by the district attorney to take the Onofre case to the United States Supreme Court for possible reversal, but that Court declined to take the case. At some point, the issue will have to be settled on a national basis.

Getting it settled is difficult, however, in those states where criminal prosecution carries a possibility of felony conviction and heavy fine. A defendant will instinctively seek a reduced plea and settle the criminal case rather than raise the issue in court and on appeal. Activists interested in raising the issue before the United States Supreme Court in a factually sympathetic context are considering the possibility of civil action under the civil rights act (42 U.S.C. §1983) in federal courts, seeking a judicial declaration of unconstitutionality of some of these restrictive statutes. Such actions may be brought by affected individuals, by others called upon to counsel such individuals and, possibly, in particular situations, by others. The case would have the best possible likelihood of surviving the preliminary challenge of the standing of the individual bringing the action if the sexual needs of the individual were objectively limited (e.g. through physical disability) to the types of sexual conduct outlawed by the statute involved.

The National Committee for Sexual Civil Liberties. The Committee is a resource available to interested persons, without any fee or cost involved. The Committee has been in existence for over a decade and involved in the forefront of court cases and other efforts at sex law reform in the various states. Its scope of activities are fairly represented in Appendix III. It was directly involved in the New York court battle.

Pending resolution of the issues involved before the Courts, a process which will take years but which requires constant effort by lawyers willing to press such cases without cost (supplementing lawyers who may have occasion to raise the issue in particular cases which come before them in the ordinary course of their profession), health professionals need to be conscious of the potential legal problems involved and, where appropriate, consult local counsel for any advice necessary to give assurance of the extent of their exposure under procedures involving the sexuality of their disabled clients.

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APPENDIX I -- Significant New York sections of the Penal Law affecting consensual adult sex and counselling relating thereto.

Section 130.38. Consensual sodomy. A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person. Consensual sodomy is a class B misdemeanor.*

Section 130.00-2. Sex offenses; definitions of terms. . . . "Deviate sexual intercourse' means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

Section 240.35-c. Loitering. A person is guilty of loitering when he: . . . 3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature. . . .

Section 130.40. Sodomy in the third degree. A person is guilty of sodomy in the third degree when:

1. He engages in deviate intercourse with a person who is incapable of consent by reason of some factor other than being less than seventeen years old. . . .

Section 130.60. Sexual abuse in the second degree. A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is:

1. Incapable of consent by reason of some factor other than being less than seventeen years old. . . .

Section 130.05 Sex offenses; lack of consent. . . . 3. A person is deemed incapable of consent when he is: . . . (b) mentally defective; or (c) mentally incapacitated; . . . .

Section 130.00 Sex offenses; definitions of terms

The following definitions are applicable to this article: . . .

5. "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct.

6. "Mentally incapacitate" means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him

without his consent, or to any other act committed upon him without his consent.

Section 20.00 Criminal liability for conduct of another.

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

Section 20.05 Criminal liability for conduct of another; no defense.

In any prosecution for an offense in which the criminal liability of the defendant is based upon the conduct of another person pursuant to section 20.00, it is no defense that:

1. Such other person is not guilty of the offense in question owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of the offense in question; or

2. Such other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof, or has legal immunity from prosecution therefor; or

3. The offense in question, as defined, can be committed only by a particular class or classes of persons, and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.

*Section 130.38 , Consensual Sodomy, was declared unconstitutional by the New York Court of Appeals in December 1980, 51 N.Y.2d 476.