BY
JAY KOHORN

SODOMY LAW REFORM

(a) Caveat

No constitutional challenge should be attempted by the novice; such an action is difficult enough for an experienced litigator. This does not necessarily mean that constitutional attacks should be avoided. On the contrary, an attorney inexperienced in such matters may, nevertheless, have an ethical duty to launch such an attack. But it is critical that those with greater experience be consulted and involved in the case at the very earliest stages. Lack of such consultation and involvement could easily result in a destructive opinion, such as that found in Doe v. Commonwealth's Attorney. 1/

The magnitude of difficulty and complexity of these types of challenges is shown in what, for sodomy law reform, may be the two most important cases now pending in the country: People v.

Uplinger 2/ and Baker v. Wade. 3/ Each of these cases was handled with the greatest of expertise and skill by some of the finest of legal minds. Yet each is in an appellate posture which could result in either a major national victory or a defeat which could create precedent which would disarm the sodomy law reform movement and permit states to invade the privacy of the bedroom for decades.

It should be noted that these two cases used antithetical approaches. Uplinger involved an actual criminal prosecution in which Mr. Uplinger was a defendant and focussed on the state court system (although the high court of New York ultimately rested its decision on federal grounds). Baker was a civil suit launched in the federal court system with Mr. Baker as a plaintiff.

Because Uplinger has now been accepted for hearing by the United States Supreme Court, until the ruling makes clear the approach of that court toward sexual privacy and the other issues involved, attorneys contemplating a constitutional challenge of this sort should consider avoiding the federal court system and the federal Constitution as the rationale. During this crucial period, state constitutions should be explored in depth for privacy, equal protection, and other pertinent provisions which may require a favorable state court decision. For example, while neither Georgia nor Massachusetts has a provision in their state constitutions giving protection to the right of privacy, both states have high court rulings which interpret the state constitutions as affording such protection implicitly. In the

meantime, most energy in the federal system and on federal issues should be reserved for Uplinger. The importance of this case can not be overstated; it is the first time the U.S. Supreme Court has taken a case presenting the sodomy law reform issues.

(b) Legal Theories

(i) Privacy

The United States Supreme Court has never stated whether the right of privacy implicit in the U.S. Constitution extends to private sexual behavior between consenting adults. Specifically, there is no Supreme Court opinion which explicitly determines whether a state criminal code can prohibit a married couple from engaging in oral or anal sodomy in their own bedroom, a single person from engaging in any sexual activity outside of marriage, or any person from engaging in consensual sexual conduct with another adult of the same gender in private. It is reasonable to assume that the privacy argument will be in the forefront when the Supreme Court resolves these issues.

One of the basic philosophical underpinnings of the right is found in John Stuart Mill's treatise On Liberty.[4] This work is infinitely quotable and is often cited in appellate briefs and court opinions. It describes the limitations on legitimate interference by society in the life of the individual. It speaks of

> . . . liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological . . . liberty of tastes and pursuits . . . so long as what we do does not harm [our fellow creatures], even though they should think our conduct foolish, perverse, or wrong . . . Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering

each other to live as seems good to themselves, than by compelling each to live as seems good to the rest . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[5]

This is often referred to as the theory of "harms." The state may not interfere with the individual or in his actions unless those actions may result in articulable and demonstrable harms to others.

The first state court decision recognizing privacy was written by Justice Cobb of the Georgia Supreme Court in 1905:

> The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved, than he has to violate the valid regulations of the organized government under which he lives . . . A right of privacy in matters purely private is therefore derived from natural law . . . It may be said to arise out of those laws sometimes characterized as "immutable," because they are natural, and so just at all times and in all places that no authority can either change or abolish them.[6]

Justice Brandeis, in a famous dissenting opinion, spoke from the United States Supreme Court about 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 men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[7]

The cases which followed and which further defined the right

of privacy over the years may be divided into three basic categories: **information privacy**, dealing with unfair and unnecessary collection and dissemination of personal information; **territorial privacy**, which supports the proposition that one's home (as well as certain other locations in which one is reasonable in expecting privacy) may be insulated from intrusion by government; and **decisional privacy**, which protects one's autonomy and freedom of choice regarding one's personality, emotions, presentation of self to society, and relationships. /8/

As noted in Baker v. Wade:

> It is clear that the right of privacy protects individual decisions concerning marriage, /9/ procreation, /10/ contraception, /11/ abortion, /12/ and family relationships /13/ -- and that any government regulation upon such fundamental rights "may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake." Dike v. School Board, 650 F.2d 783, 786-87 (5th Cir. 1981). However, the "outer limits" of the right of privacy have not been established. Carey v. Population Services, 431 U.S. 678 (1977) at 684. /14/

From these cases it is now clear that the right of privacy is "not limited to the marital relationship," /15/ but also protects the right to birth control devices and information for singles.

However, the Supreme Court has not been willing to apply the privacy theory to unconventional or "alternate" lifestyles. As a result, constitutional evolution in this area has most often taken place in the state courts. For example, the Supreme Court of New Jersey invalidated that state's fornication statute based upon the decisional privacy rights of consenting adults:

> We conclude that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice. Although persons may differ as to the

> propriety and morality of such conduct and while we certainly do not condone its particular manifestations in this case, such a decision is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard.
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> . . . [Supreme Court decisions have] underscored the inherently private nature of a person's decision to bear or beget children. It would be rather anomalous if such a decision could be constitutionally protected while the more fundamental decision as to whether to engage in the conduct which is a necessary prerequisite to child-bearing could be constitutionally prohibited. Surely, such a choice involves considerations which are at least as intimate and personal as those which are involved in choosing whether to use contraceptives. We therefore join with other courts which have held that such sexual activities between consenting adults are protected by the right of privacy. /6/

The fundamental right to make personal decisions is stronger when the manifestations of those decision take place in the privacy of the home. This strong combination of "decisional" and "territorial" privacy is evident in Stanley v. Georgia, in which the Supreme Court reversed, based upon the right of privacy, a conviction for possession of obscene material. It is not clear that the court would have found in the defendant's favor if the obscene material had been found in the defendant's car, his office, or some other quasi-public location.

While the right to manifest one's personality in one's relationships, sexual and otherwise, seems to emanate from "decisional" privacy, many attorneys familiar with this area feel that, as a practical matter, if the Supreme Court will recognize protection for same gender consenting adult sexual conduct at all, it will only be in a factual context involving the "territorial" privacy of one's own home. This theory is reasonable and may become an important factor in deciding, in a criminal law context, whether one's factual situation is likely

to result in good or bad precedent.

Occasionally, the Supreme Court has "summarily affirmed"[18] or "dismissed for want of a substantial federal question," both without writing an opinion. These types of decisions are troublesome because they do have some precedential value.[19] While "want of a substantial federal question" is a conclusion as to the merits of a case, when faced with precedent of this sort an attorney would attempt to distinguish the facts and law applicable in his or her particular case. Otherwise such a dismissal is binding precedent in all lower federal courts and in state courts when deciding federal issues.[20]

A separate and distinct New York statute still criminalized the act of loitering or remaining "in a public place for the purpose of engaging or soliciting another person to engage, in deviate sexual intercourse [i.e., sodomy] or other sexual behavior of a deviate nature."[21] A challenge by the same attorney who represented Mr. Onofre resulted in the state's high court invalidating the statute, basing its decision totally on its earlier decision in Onofre.[22] Again, the state petitioned the U.S. Supreme Court for certiorari. That petition was granted on October 4, 1983, and it is clear that the decision in Onofre is again in jeopardy. Such a scenario should certainly dispel any myth that penal law reform through constitutional challenge is a simple matter![23]

(ii) Equal Protection

One of the first considerations in preparing for a challenge of a sodomy statute is the language of the statute itself. If the language of the statute is so vague that persons of common

intelligence do not know exactly what they must refrain from doing in order to avoid breaking the law, then the statute is unconstitutionally vague and violative of due process.[24]

One must also ascertain whether the prohibition applies only to same gender sexual conduct and whether married persons are exempted from the ambit of the statute. If so, then the statute may violate either or both state and federal equal protection standards. The federal standard requires like treatment for "all person similarly circumstanced."[25]

There seem to be three standards of review under equal protection. The first requires simply that the discrimination bear "some rational relationship to legitimate state purposes."[26] The courts in Baker v. Wade, People v. Onofre, and Commonwealth v. Bonadio, all cited above, all based their opinions in whole or in part on the lack of any rational basis for the distinction made by the statute. In Onofre, New York's high court stated:

> As to The Denial of defendants' right to equal protection. Section 130.38 of the Penal Law on its face discriminates between married and unmarried persons, making criminal when done by the latter what is innocent when done by the former. With that distinction drawn, we look to see whether there is, as a minimum, "some ground of difference that rationally explains the different treatment accorded married and unmarried persons" under the statute . . . In our view, none has been demonstrated or identified by the People . . . The statute therefore must fall as violative of the right to equal protection enjoyed by persons not married to each other.[27]

A higher level of scrutiny -- namely, that a legislative classification will be struck down unless it is justified by a "compelling state interest," the so-called "strict scrutiny" standard -- may be appropriate if the classification is

irrelevant to any proper legislative goal;[28] if the statute discriminates against a "suspect class";[29] or if a statute violates a specially protected constitutional right, such as the right to travel.[30]

A third "intermediate level of review" which has been approved by the Supreme Court in equal protection cases involving discrimination on the basis of gender and illegitimacy, requires that the statute involving discrimination must be struck down unless it is shown to further some substantial goal of the state.[31]

The issue of whether there exists a valid state purpose to the law -- whether under the rational basis or the compelling state interest standard -- is an important one. State interest may be linked by the opponent of reform to public disdain and abhorrence in western civilization; to morality, public health, or procreation; and to certain myths regarding homosexuality as unnatural and an illness, possibly contagious, and homosexuals as child molesters and proselytizers.

All of these factors can be satisfactorily addressed but require a holistic approach, including testimony or assistance of experts in the areas of psychiatry, medicine, history, sociology, and theology.

In Baker v. Wade, cited above, for example, the attorney for Mr. Baker used a psychiatrist with expertise in the treatment of homosexuals to show that usually sexual orientation is not a matter of choice but is determined either prenatally or in early infancy; that homosexuality is not an illness and is not

contagious; and that homosexuals are not child molesters. He also used a sociologist to show the social and law-abiding characteristics of homosexuals, and a theologian to show the narrow context of the Judeo-Christian proscriptions.

It must be remembered, however, that we live under Constitutional -- not majority -- rule, and "[the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions . . . novel and even shocking ought not to conclude our judgment upon the question [of constitutionality]." 32/

Medical expertise may be necessary if the disease factor becomes an issue. An expert in this area could show that homosexuality per se has nothing to do with any particular disease, that diseases are also found in groups other than homosexuals, that some diseases are virtually unknown in lesbians, and that the general public health could be harmed if those with diseases are driven underground because of criminal statutes.

The Privacy Commission Report 33/ examines several of the most destructive myths about homosexuality which may arise during the course of litigation. 34/ One such myth is that those engaging regularly in same gender sex constitute an insignificant minority. Discrimination against even a few, or course, is unjust. However, in the post-Kinsey era, there can be no assertion that the millions of lesbians and gay men residing in the country are insignificant in numbers. 35/

The Commission also dispelled the myth that lesbians and gay men are child molesters.

> The Commission's research, as well as that of the Oregon Task Force on Sexual Preference, shows that most victims of child molestation are female, and the perpetrators are most often adult male relatives. "Child molesting is primarily a problem within the family," and is not related to having lesbians and gay men in "sensitive" positions, such as police work, hospital jobs, and positions in elementary and secondary schools. 36/

(iii) Establishment of Religion

It could be shown that the primary effect of sodomy laws is "to advance . . . religion" 37/ if one could prove that there is no secular purpose to the laws, no secular harms to society, and no real relationship between the conduct and any legitimate state interest. The proscription would thus remain solely ecclesiastically based. This theory has not yet been fully developed by legal scholars, and this writer feels that it would be very difficult to develop a philosophical mechanism to determine which harms to society are purely religious and which have some secular justification as well.

(c) Strategic Considerations

The following listing is not exhaustive; the considerations which must be examined before an appeal is brought could be the subject of an entire volume. However, the following issues have been found to be of fundamental importance to attorneys launching such litigation contests in the past. A very brief description of each issue is intended only to assist the attorney in defining the issue for purposes of doing his or her own research.

(i) Choice of Statute to Attack

Sometimes a jurisdiction has a sodomy law, a fornication law, a solicitation statute, a loitering statute, as well as a

penal proscription on any public sexual conduct. Certainly, the chance of a sodomy law challenge failing is much greater in a state which still criminalizes consenting adult sexual conduct for heterosexuals using the most traditional positions, than in a state which has already decriminalized such conduct. Thus, whenever possible, as part of a long-term project to eradicate the sodomy law, the attorney should first attack any existing fornication statute.

Of course, the attorney does not always have a choice of what statute is to be challenged. However, since a challenge which is probably doomed to failure may also create bad precedent which will be binding on many other cases for a long period of time, the client should be informed of the attorney's assessment of such strategic and practical considerations before the client is asked to make the decision as to whether to go forward. 38/

(ii) Facts of Case

Some facts are inherently bad for a constitutional challenge of a sodomy statute; if the alleged conduct was alleged to have been committed with force or violence, to have been coupled with a separate crime such as solicitation of prostitution, or to have been committed in a public place so that the conduct would have been criminal under a different statute. Sometimes, however, as when a defendant is faced with a considerable time in jail or prison, the defense attorney must, notwithstanding the poor facts, fight the appellate battle. 39/ There are times when the attorney will find him or herself faced with a conflict of interest between the duty of a defense attorney and the strategy considerations of an advocate for gay and/or human rights. In

this area, there is no easy answer, except that the duty to the client must usually be paramount, and a complete disclosure to the client of the strategy issues and the likelihood of failure on appeal coupled with the likelihood of creating bad precedent, may result in the client's resolving the conflict in favor of accepting the court's sentence without an appeal.

(iii) Standing

In an appeal there exist various types of issues related to standing. 40/ Others relate to the question of whether to bring a constitutional challenge in the form of an appeal from a criminal conviction or whether more aggressively to find a plaintiff to challenge the statute in a civil case. A civil case, especially in federal court, must first confront the obvious standing problem of an actual case or controversy. 41/ Whether this obstacle may be overcome may depend on the extent the attorney is able to convince the court that the client is facing a constant threat of prosecution because he is homosexual and because the criminal law in the jurisdiction is being enforced whenever possible. The doctrine of abstention might be invoked by a federal court in a civil action if a criminal action is also pending, 42/ and the court might also avoid answering the constitutional questions if it can decide the case more narrowly by judicial interpretation of any other unsettled aspect of the law. 43/

(iv) Severability of Proscriptions Against Private and Public Conduct

Often a court which is hesitant to declare a statute totally unconstitutional will nonetheless be willing to limit the purview

of the statute instead. In the context of "lewd conduct" statutes, this has often been the approach of the state courts. One way courts have constitutionally construed statutes is by limiting their proscription to conduct occurring in a public place. 44/

(v) Possibility of Legislative Reform

Courts which limit a criminal statute through interpretation or which declare criminal statutes unconstitutional are often accused of invading the territory of the legislature. A proper response would point out that the legislature must be limited in its actions by the principles set forth in the state and federal constitutions; otherwise, the constitutional provisions would mean nothing. Yet, many courts avoid constitutional issues by suggesting that the questions raised by a case are properly within the jurisdiction of the legislature and should be presented there. Attorneys interested in these issues should remain informed about pending penal code reform in their jurisdictions and should work with legislators on the practical formalities -- such as appropriate wording -- which is often really beyond the expertise of those drafting the statutes.

(vi) State vs. Federal Court; State vs. Federal Grounds

While there is often concurrent jurisdiction to hear a civil claim that a law is unconstitutional and violative of civil rights, 45/ whether a criminal case is heard in federal or state court is really outside the control of the defense attorney. As to such civil suits, the high court of each state is the final arbiter of the meaning of that state's constitution, so when a

challenge is based upon state constitutional grounds, the state's forums should be used.

Traditionally, constitutional evolution has often taken place in the state courts while the federal courts have remained more conservative. Decisions made on state grounds are not appealable to the U.S. Supreme Court, and the very conservative nature of the members of that body seem to suggest the propriety of using state grounds and state courts until the consensus among the states is more heavily balanced in favor of reform.

(vii) Criminal vs. Civil vs. Collateral Case

There is continuing disagreement as to whether it is more dangerous or more advantageous to bring constitutional challenges by way of civil or criminal actions. While a civil case is often factually cleaner, the lack of prosecution may result in an appellate court's deciding, even after great effort by the attorneys, that there exists no standing, no case or controversy.

Some states allow for declaratory judgments more readily than others, so a civil case brought in a state court must presuppose substantial research about the local rules. The issue may be more ripe and poignant in the context of the right criminal prosecution, but if the facts of the case intimate that other laws have been broken as well, or any other aggravating factor -- which the facts of such cases often do(!) -- there is a great possibility that the court will never get to the real issues or may write an opinion based upon those facts which creates negative precedent for a long time. Of course, an attorney may bring the action based upon a criminal prosecution

in the state court and on state and federal grounds, obtain a favorable ruling from the state's high court solely on the federal grounds (which is not the attorney's fault), and find him or herself before the U.S. Supreme Court after granting of a petition for writ of certiorari filed by the prosecutors in the original case.[46] C'est la guerre!

(viii) Class Action

Before tackling the enormous difficulties of a class action suit, including the problems obtaining certification because of the requirement that members of the class be adequately defined, the attorney should know the state and federal rules on the subject and should tap the expertise of those who have had experience in this area.[47] Such litigation is very complex and should not be started without adequate funding.

(d) Other Factors for Argument

The following factors are just some of the many issues which should be explored by the attorney intending to bring a challenge to any statute.

(i) Age of Statute

If a statute is very old, the degree that the proscription is entrenched in the culture and framework of the society may have to be overcome. On the other hand, the original legislative rationale for the statute may be subject to attack based upon modern information such as that supplied by the Kinsey studies; it may be argued that the court must use a post-Kinsey understanding to evaluate the statute.[48]

(ii) Any Period During Which Statute Was Not in Force

It may be possible for an attorney to show statistically that there was no appreciable harm to society during the period in which a sodomy law was not in effect; even a short period of non-usage may show lack of a legitimate state purpose. 49/

(iii) Independent State Grounds

Because states often interpret their constitutional provisions more broadly that the federal courts interpret the federal counterparts, it may be advantageous to explore and compare the two interpretations of the same provisions -- such as equal protection, due process, privacy, etc. -- before deciding which forum to use. It is a shame that the doctrine of independent state grounds is not researched or used more often.

(iv) Interpret vs. Invalidate Statute

As has been suggested above, while it may be impossible to convince a court to invalidate a statute, courts seem more willing to limit or narrow a statute's purview with a judicial interpretation which avoids or disarms the constitutional issues. 50/ Argument before an appellate court might be more likely to result in judicial reform if the attorney gives the court several options, including a new and constitutional interpretation of the statute.

(v) Explicit Solicitation Provision vs. General Solicitation Law

Argument must be formulated considerably differently if the jurisdiction in which the challenge is made has a separate general solicitation law rather than an explicit provision in the sodomy law which criminalizes solicitation of sodomy. Of course, if there is only a general solicitation law -- one which

prohibits soliciting any crime -- in the jurisdiction, then the invalidation of the sodomy proscription will automatically mean that solicitation is no longer a crime. Otherwise, it must be remembered that the First Amendment does not, in some cases, include protection for soliciting a crime, so that attack should be focussed on the activity proscribed rather than the speech. 51/

(vi) Inclusion vs. Exemption of Married Persons or Heterosexuals

The strength of any equal protection argument which counsel may envision may depend upon whether married persons are treated differently than single and whether homosexuals are treated differently than heterosexuals. Certainly, if oral or anal sex is harmful in some way, then it could be argued that the state purpose would be satisfied only by a total proscription. A limited proscription, on the other hand, seems necessarily to come out of a rationale which judges certain conduct to be wrongful based only on who engages in that conduct, i.e., judging the status of the actors rather than their acts. Such an argument should also bring to the court's attention the inscription above the steps of the U.S. Supreme Court Building in Washington, D.C. 52/

(vii) Recent Legislative Amendment of Statute

In Texas, the sodomy law punishment was so considerably reduced by the legislature that an attorney could raise the inference that even the legislature felt the harms of the conduct were so insignificant that it did not feel it necessary to prescribe a punishment which would be harsh enough to discourage

the activity. On the other hand, if the criminal sanction is insignificant, it is possible that neither the courts nor the legislature would be concerned or outraged enough about the injustice to act.[53] Sometimes, the attorney is faced with an opportunity to endorse a legislative movement to reduce the severity of the punishment for the crime. Such a legislative act may be beneficial for many people; however, it may also cause real legislative decriminalization to be postponed many years.

(viii) Privacy Protection under State Constitution

The attorney should be thoroughly versed on the privacy law of his or her particular jurisdiction. Ten states have explicit or implicit privacy protection in their constitutions, and challenges in these states should focus on these provisions or interpretations.[54]

(ix) Historical Evolution of Concepts of "Morality," "Unnatural," and Secular vs. Ecclesiastical Law

These religious issues are very difficult and require a great deal of scholarly research. This writer suggests that such issues be addressed in an amicus curiae brief with the assistance of one of many noted scholars in this area.[55]

(x) Vagueness of Terms

Statutes in some states may be vulnerable to attack on the basis of the void-for-vagueness doctrine, especially if those statutes were composed at a time when polite society did not speak of such things and instead used such euphemisms as "abominable and detestible crime against nature" or "deviate sexual conduct." Care must be taken, however, to ascertain whether these terms are defined elsewhere in the criminal code.

Of course, vagueness is a due process issue because it results in insufficient notice as to what constitutes the crime. 56/ Such lack of notice can lead to arrests without probable cause, in violation of the Fourth Amendment and state counterparts; arbitrary and discriminatory enforcement of the law; deprivation of the right to counsel and the right to a fair trial, since defense counsel must have guidelines as to the meaning of the statute in order to frame a defense, and the jury and judge must know the exact elements of the crime in order to pass judgment without speculating; a chilling effect on protected conduct and speech (when solicitation is also involved), since people may refrain from engaging in lawful activity for fear of being arrested ("prior restraint"); and inconsistencies in application of the law, which is itself unconstitutional in some states (lack of uniform operation).

(xi) Recommendations of American Law Institute and Other Professional Associations

Appellate counsel should become familiar with the studies and reports discussed in note 10, supra. Especially significant is the work of the American Law Institute in the 1950's, the Model Penal Code.

(xii) Effect on Right to Travel

While the arguments regarding the fundamental right to travel have not been thoroughly developed yet in the context of sodomy law reform, such a theory appears to this writer to be of potentially paramount importance in a challenge before the U.S. Supreme Court. A significant majority of the people who live in this country now reside in states in which they enjoy the right

to autonomy in decision making about their relationships and in actions in private (involving consenting adults). To impose on these people the requirement that they and their loved ones avoid traveling and staying in certain states or, before doing so, ascertaining what they can and cannot do sexually with their own mates, may create an unconstitutional burden. This issue may be further developed in Uplinger.[57]

Other Law Reform

The areas mentioned below are worthy of an entire chapter; however, the purpose of the comments made here is simply to serve as a catalyst to thought and further research.

(a) Public Sexual Conduct/Solicitation

(i) Vagueness/Overbreadth

Vagueness and overbreadth are related doctrines, the latter applying specifically in the free speech context.[58] If a statute proscribing solicitation is vague, it may catch within its ambit both criminal and protected speech. Because of the special concern for freedom of speech in United States jurisprudence, the normal standing rules do not apply;[59] the normal presumption in favor of legislation is reversed; and the court must strictly scrutinize the statute if it has an impact on such First Amendment issues.[60]

Often the vagueness of a statute lies in the indefinite nature of particular words contained therein. The prototype of the arguments regarding the definitions of "lewd," "public place," and criminal "solicitation," as well as the desired result of such arguments, is found in the California Supreme

Court case Pryor v. Municipal Court.[61] Shortly after the Pryor decision, the high court of Massachusetts followed the California court's example in Commonwealth v. Sefranka.[62] These cases first examine the underlying legislative purpose of the pertinent statute and find that purpose to be the protection of persons who might be offended by viewing the conduct. No moral judgments are made; only secular harms are explored.

As to a rational limitation on the term "public place," the Pryor court ruled that:

> [E]ven if conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, the state has little interest in prohibiting that conduct if there are no persons present who may be offended. The scope of [the lewd conduct statute] should be limited accordingly.[63]

Thus, the term "public place" was limited to a place "exposed to public view," which would exclude a public "hotel room" or even a "fully enclosed toilet booth" in a public restroom.[64]

The court also ruled that some onlooker who might be offended must be present; it is not enough that the location is such that there is some likelihood that someone might come upon the scene in the future.[65]

Those jury instructions also set forth the rather explicit and detailed definition of "lewd." The term, according to the court in Pryor, was originally conceived to be as vague as necessary to allow the police to cast their nets at large so as to catch undesireables; their discretion was unfettered.[66] The new definition took away that discretion and set forth objective standards so that members of the public as well as persons in the criminal justice system would know exactly what constituted the

crime. This new definition limited the possibility of arbitrary and discriminatory enforcement of the law. [67]

Finally, the "solicitation" portion of the statute was limited to solicitation of conduct which would be criminal under the new definition of "lewd"; even offensive public solicitations for lawful private sexual acts could not be criminalized under the statute. [68]

(ii) Other arguments

In addition to traditional vagueness and overbreadth arguments, appellate counsel should become familiar with application of the law in various local jurisdictions within the state. Often vague statutes lend themselves to unequal enforcement because so much discretion, even in the definition of the crime, is left to law enforcement officials, judges, and prosecutors. When there is a lack of uniform operation of law, equal protection and discriminatory enforcement arguments may be appropriate. There may also be a state constitutional provision requiring uniform application of the law.

(b) Loitering

Loitering statutes, such as loitering for the purpose of committing a lewd act, or loitering for the purpose of soliciting deviate sexual conduct, are presently the subject of constitutional examination in the United States. Loitering alone can not be made criminal, and loitering statutes are often considered in the same category as vagrancy laws which criminalized status rather than acts and have uniformly been ruled unconstitutional in this country. [69] The question remains whether the addition of a specific intent requirement, i.e.,

having the intention to commit an unlawful act, is sufficient to save such statutes. [70] In other words, does "lingering" in a location with an intention to commit a crime as opportunity presents itself, provide a definite enough standard to meet the due process requirements discussed earlier? Lingering itself is not a crime; neither is having the intention to commit a crime. Who has not had some evil thoughts?

The problem with loitering statutes is deepened because of the intrusion on people's lives and actions which they encourage. Because no one really can know the thoughts of another, police officers must speculate as to what a lingerer is thinking, thus giving authority to police to arrest on suspicion and without actual probable cause. Many of the other issues discussed above are also present in cases challenging loitering laws, and most of the grounds for such challenges are found in the myriad of cases which have already invalidated such statutes. [71]

Virginia's sodomy law.

19/ See Hicks v. Miranda, 422 U.S. 332 (1975). "Summary affirmance" is not, however, to be given the same precedential weight as an opinion "treating the same question on the merits." Edelman v. Jordan, 415 U.S. 651, 671 (1974); see also Fusari v. Steinberg, 419 U.S. 379, 388 n.15 (1975). Carey v. Population Serv. explicitly limited the summary affirmance of Doe by stating that:

> . . . the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults, . . . and we do not purport to answer that question now. [431 U.S. at 688 n.5, Id. at 694 n.17].

20/ Some of the best judicial language regarding the right of privacy in the context of a sodomy law challenge can be found in the Onofre cases. The intermediate appellate court decision (424 N.Y.S.2d 566 (1980)), held:

> Thus it is seen that the concept of personal freedom includes a broad and unclassified group of values and activities related generally to individual repose, sanctuary and autonomy and the individual's right to develop his personal existence in the manner he or she sees fit. Personal sexual conduct is a fundamental right, protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body. The right is broad enough to include sexual acts between non-married persons and intimate consensual homosexual conduct.

This language cannot be cited as precedent because the case was subsequently reviewed by the highest court of the state, the Court of Appeals (51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. den. 451 U.S. 987 (1981)). The state's high court also spoke of privacy:

> As to the right of privacy. At the outset it should be noted that the right addressed in the present contest is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accord with those decisions, undeterred by governmental restraint.
>
> . . .
>
> The People are in no disagreement that a fundamental right of personal decision exists; the divergence of the parties focuses on what subjects fall within its

protections, the People contending that it extends to only two aspects of sexual behavior -- marital intimacy . . . and procreative choice . . . Such a stance fails however adequately to take into account the decision in Stanley v. Georgia . . . and the explication of the right of privacy contained in the court's opinion in Eisenstadt [Eisenstadt v. Baird, 504 U.S. 438 (1972)]. . . .

In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, 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 those decisions are voluntarily made by adults in a non-commercial, private setting . . . . [Onofre, 51 N.Y.2d at 485-488, 434 N.Y.S. at 949-51, 415 N.E.2d at 940-41.]

Since the opinion was based upon the federal right of privacy, the state petitioned the Supreme Court for writ of certiorari. Certiorari was denied. [451 U.S. 987]

21/ N.Y. Penal Law Section 240.35, subd. 3 (McKinney 19)

22/ People v. Uplinger, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (1983).

23/ All of the law review articles of Professor David Richards are of great value; his work should be an important resource for anyone contemplating a constitutional attack. Especially significant regarding privacy is his article "Homosexuality and the Constitutional Right to Privacy", Review of Law and Social Change, Vol. III at 311 (1978-79).

24/ See Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Grayned v. Rockford, 408 U.S. 104, 108 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

25/ See Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

26/ See San Antonio School District v. Rodriguez, 411 U.S. 1, 40 (1973); see also Silva v. Vowell, 621 F.2d 640, 647 (5th Cir. 1980).

27/ Onofre, 434 N.Y.S.2d at 953.

28/ See McLaughlin v. Florida, 379 U.S. 184, 191-93 (1964).

29/ See Loving v. Virginia, 388 U.S. 1, 11 (1967); Frontiero v. Richardson, 411 U.S. 677, 682 (1973). Persons engaging in same-gender sexual conduct have not yet been deemed a "suspect class"

by U.S. courts.

30/ See Shapiro v. Thompson, 394 U.S. 618 (1969). Much additional research, thought, and discussion must be done before the right of travel is used to justify an equal protection attack on a sodomy law. However, given the present fact that at least half the states have decriminalized and well over half the population reasonably expects freedom from government interference in their consensual adult sexual choices, the right to travel freely throughout the country may be severely hampered by such statutes.

31/ Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549 (1982); Plyler v. Doe, ___ U.S. ___, 102 S.Ct. 2382 (1982), pet. reh. den. 103 S.Ct 14; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173 (1972); Craig v. Boren, 429 U.S. 190, 197 (1976).

32/ Roe v. Wade, 410 U.S. at 117, quoting the "now-vindicated dissent" of Justice Holmes in Lochner v. New York, 198 U.S. 45, 76 (1905). See Baker v. Wade, 553 F.Supp. at 1145.

33/ [redacted].

34/ [redacted]

35/ Kinsey, Pomeroy, and Martin, Sexual Behavior in the Human Male (Philadelphia: W.B. Saunders, 1948); Bullough, V., Sin, Sickness and Sanity (New York: Garland Press, 1977); "A New Big Push for Homosexuals' Rights," U.S. News and World Report (April 14, 1980) at 93-95; Final Report of the State of Oregon Task Force on Sexual Preference (1978) pages 18-19.

36/ Privacy Report, Executive Summary, note 10 supra, at 42; see also People v. Giani, 145 Cal.App.2d 539, 302 P.2d 813 (1956); Report of the Subcommittee on "Homosexuality and the Law" to the San Francisco Mental Health Advisory Board, adopted unanimously by the Board on April 10, 1973; "Molester Data Erroneous, Gates Admits," L.A. Times, part II, page 1, July 12, 1978.

37/ Harris v. McRae, 448 U.S. 297, 319 (1980).

38/ See, e.g., State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977).

39/ See U.S. v. Lemons, 697 F.2d 832 (8th Cir. 1983), an unsuccessful appeal from a conviction by the District Court for the Western District of Arkansas.

40/ [redacted]

41/ Babbitt v. United Farmworkers, 442 U.S. 289, 298 (1979); Steffel v. Thompson, 415 U.S. 452, 459 (1974).

42/ See Younger v. Harris, 401 U.S. 37, (1971).

_43/ See Railroad Comm. of Texas v. Pullman, 312 U.S. 496, 498 (1941).

_44/ See Pryor v. Municipal Court, 25 Cal.3d 238, 253-54, 158 Cal.Rptr. 330, 599 P.2d 636 (1979); Commonwealth v. Sefranka, 414 N.E.2d 602, 604 (Mass., 1980).

_45/ 28 U.S.C. section 1343(3) (Supp. V 1981) and 42 U.S.C. section 1983 (Supp. V 1981); Martinez v. California, 444 U.S. 277, 100 S.Ct. 553 (1980).

_46/ This is the Uplinger scenario. [58 N.Y.2d 936; 460 N.Y.S.2d 514 (1983), cert. granted, 52 U.S.L.W. 3229 (U.S. Oct. 4, 1983), (No. 82-1724)].

_47/ See Cyr v. Walls, 439 F.Supp. 697 (N.D. Tex. 1977); Williams v. New Orleans Steamship Ass'n, 673 F.2d 742 (5th Cir. 1982); Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972); Baker v. Wade, 553 F.Supp. 1121 (N.D. Tex. 1982); Penson v. Terminal Transport Co., 634 F.2d 989 (5th Cir. 1981); Zablocki v. Redhail, 434 U.S. 374 (1978).

_48/ See Kinsey, Pomeroy, and Martin, Sexual Behavior in the Human Male (Philadelphia: W.B. Saunders, 1948).

_49/ Both Arkansas and Idaho recriminalized after a period in which sodomy was not illegal. It may be helpful to look at the legislative argument leading to reenactment. There may be none.

_50/ See Section (c)(iv), supra.

_51/ See Pryor v. Municipal Court, supra note 116; see also Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827 (1969), in which the court stressed that ". . . the constitutional guarantees of free speech . . . do not permit a state to forbid or proscribe advocacy of . . . law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

_52/ "Equal Justice Under Law."

_53/ But see Baker v. Wade, supra note 3.

_54/ Express privacy provisions are found in the state constitutions of Alaska (1972), California (1972), Florida (1980), Hawaii (1978), Illinois (1970), and Montana (1972). Such protection is said to be implicit in the state constitutions of Georgia, Massachusetts, New Jersey, and Pennsylvania by the high court of each of those states: Pasevich v. New England Life Ins. Co., 50 S.E.2d 68 (Ga. 1905); Moe v. Secretary of Admin. and Fin., 417 N.E.2d 387 (Mass. 1981); In re Quinlan, 70 N.J. 10, 355 A.2d 647 (N.J. 1976); Commonwealth v. Murray, 423 Pa. 37, 223 A.2d 102 (1966).

_55/ One such noted scholar is Professor Wayne Dynes of New

York; he also remains in contact with other scholars in this country and in other countries and can be an invaluable resource.

56/ "A penal statute is void on its face if it forbids 'the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' (Connally v. General Const. Co. (1926) 269 U.S. 385, 391.) Vague statutes offend several important values, as explained by the United States and California Supreme Courts: '"First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Secondly, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . . . Cal.Rptr. 813 (1978).

Sandra D. O'Connor reiterated this standard in the recent case Kolender v. Lawson, (1983) ___ U.S. ___, 103 S.Ct. 1855, 1858-59, 75 L.Ed 903, 909:

> . . . the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." [Citations] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

57/ See supra note 3.

58/ See Sections (b) and (d)(x), supra, for more on problems with vague statutes.

59/ [redacted].

60/ See "Note, The First Amendment Overbreadth Doctrine," 83 Harv. L.Rev. 844 (1970); "Note, Less Drastic Means and the First Amendment," 78 Yale L.J. 464 (1969); United States v. C.I.O., 335 U.S. 106 (1947); Sanita v. Board of Police Comm., 27 Cal.App.3d 993, 104 Cal.Rptr. 380 (1972); Butler v. Michigan, 352 U.S. 380, (1957); and Pryor v. Municipal Court, 25 Cal.3d 238, 254, 158 Cal.Rptr. 330 599 P.2d 636 (1979), in which the California Supreme Court noted the constitutional difficulties inherent in the criminalization of solicitations of conduct not amounting to a crime.

See also the exceptional article by Dr. Arthur C. Warner of Princeton, entitled "Non-Commercial Sexual Solicitation, The Case for Judicial Invalidation," 4 Sex.L.Rptr. 1. In a different form, this article was the basis for an amicus curiae brief on behalf of the petitioner in Pryor, footnote 85, above.

/61/ 25 Cal.3d 238, see supra note 73.

/62/ 414 N.E.2d 602, see supra note 73.

/63/ Pryor, 25 Cal.3d at 256, 158 Cal.Rptr. at 341.

/64/ Id. at n.12.

/65/ Id. at 247. Some of the jury instruction set forth in section 11.4.2(a), supra, and the Appendix to this chapter delve further into the complexities of who might be, and who should not be considered someone "who may be offended."

/66/ Id. at 247, 158 Cal.Rptr. at 334-35.

/67/ Id. at 256-57, 158 Cal.Rptr. at 341.

/68/ Id. at 254, 158 Cal.Rptr. at 339

/69/ See Sherry, Arthur H., "Vagrants, Rogues and Vagabonds -- Old Concepts in Need of Revision," 48 Cal.L.Rev. 557, 562-65 (1960), which sets forth the rationales for the penal code reform which followed this article in California.

/70/ See In re Cregler, 56 Cal.2d 308, 312, 14 Cal.Rptr. 289, 363 P.2d 305 (1961).

/71/ See Kolender v. Lawson, ___ U.S. ___, 103 S.Ct. 1855 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Florida, 405 U.S. 172 (1972); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965); Thompason v. City of Louisville, 362 U.S. 199 (1960); Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980); Powell v. Stone, 507 F.2d 93 (9th Cir. 1974); Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1074); Anderson v. Nemetz, 474 F.2d 814 (9th Cir. 1973); Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972); Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968); Territory of Hawaii v. Anduha, 48 F.2d 171 (9th Cir. 1931); Decker v. Fellis, 306 F.Supp. 613 (D. Utah 1969); Lazarus v. Faircloth, 301 F.Supp. 266 (S.D. Fla. 1969); Goldman v. Knecht, 295 F.Supp. 897 (D. Colo. 1969); Gates v. Municipal Court, 135 Cal.App.3d 309 (1982); People in Interest of C.M., 630 P.2d 593 (Colo. 1981); People v. Gibson, 521 P.2d 774 (Colo. 1974); Arnold v. City and County of Denver, 464 P.2d 515 (Colo. 1970); Stoutenburgh v. Frazier, 16 App. D.C. 229 (1900); Headley v. Selkowitz, 171 So.2d 368 (Fla. 1965); Soles v. City of Vidalia, 92 Ga.App. 839, 90 S.E.2d 249 (1955); In re Doe, 513 P.2d 1385 (Hawaii 1973); State v. Grahovac, 480 P.2d 148 (Hawaii 1971); State v. Aucoin, 278 A.2d 395 (Me. 1971); Alegata v.

Commonwealth, 231 N.E. 2d 201 (Mass. 1967); Commonwealth v. Carpenter, 91 N.E.2d 666 (Mass. 1950); People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411 (1973); People v. Diaz, 4 N.Y.2d 469, 151 N.E. 2d 871 (1958); City of Cleveland v. Baker, 167 N.E.2d 119 (Ohio 1960); Hayes v. Municipal Court of Oklahoma City, 487 P.2d 974 (Okla. 1971); Rainbolt v. State, 260 P.2d426 (Okla. 1953); State v. Debnam, 542 P.2d 939 (Or. 1975); City of Portland v. White, 495 P.2d 778 (Or. 1972); Portland v. James, 444 P.2d 554 (Or. 1968); State v. Martinez, 85 Wash.2d 671, 538 P.2d 521 (1975); City of Bellvue v. Miller, 85 Wash.2d 539, 536 P.2d 603 (1975); City of Seattle v. Pullman, 82 Wash.2d 794, 514 P.2d 1059 (1973); City of Seattle v. Drew, 423 P.2d 522 (Wash. 1967); State v. Starks, 51 Wis.2d 256, 186 N.W.2d 245 (1971).