OUTLINE REMARKS -- Sodomy Reform (The New York experience)
W. H. Gardner July 30, 1984

People v. Rice, 41 N.Y.2d 1018 (1977): Defendant was charged with consensual sodomy. The act occurred in a public place. The appeal was from denial of a motion to dismiss before trial. Whether constitutional rights of privacy were implicated depended on facts of the case, including, the Court of Appeals said, the place of the action and whether others were present. The Court declined to decide the important constitutional issues presented (as the Court characterized them) on a bare-bones, pre-trial record. The case was remanded for further proceedings, without prejudice to presentation of the constitutional issues again after trial.

[The case was never tried; apparently, the defendant skipped. Thus, the Court never had the opportunity to deal with the issues further in that case. Note that the act allegedly occurred in a public lavatory.]

People v. Onofre, 51 N.Y.2d 476 (1980), rearg. den. 52 N.Y.2d 1072 (1981), cert. den. 451 U.S. 987 (1981):

Three cases were involved: [1] Ronald Onofre, resident in the Syracuse area, involving alleged consensual sodomy with a teenager (over the age of consent), Onofre being in his early 30's, [2] Philip Goss and Conde Peoples Jr., Buffalonians accused of committing oral sodomy with each other in a parked automobile in a Buffalo Park at about 4:30 A.M. under conditions where the likelihood of observation by a member of the general public was slight and [3] Mary Sweat (allegedly a prostitute, but with no proof of consideration for the act), accused of having committed oral sodomy on a male in a motor vehicle parked on a Buffalo street at approximately 3:00 A.M., with little likelihood of observation by a member of the general public.

(Note: Goss, Peoples and Sweat were all discovered, allegedly in the act, by investigating police officers. Goss and Peoples claimed that they were not engaged in sodomy at all, they were just talking. They engaged in a sex act [mutual masturbation] before the police arrived, but that was no longer happening. Their testimony to this effect at the trial was rejected by the jury [mutual masturbation not being within "consensual sodomy" under the statute]. Goss and Peoples claimed the police testimony was perjured, apparently motivated by a desire to make

make the arrest stick and, further, because Peoples had been aggressively assertive about his "rights" at the time of the confrontation with the police.)

Some of the tactical decisions and considerations in Onofre's handling need to be mentioned. (As to Ronald Onofre's case, this writer's comments are limited to more removed vision on the matter. There has not been a chance to share this memo with Bonnie Strunk of Syracuse, prior to its distribution, to pick up other comments and make appropriate corrections.)

A. Chinks in the defendants' armor. None of the defendants came to the judicial system lily white. The prosecution, in both counties, sought to make the most of the perceived personality or fact weaknesses in the cases:

1. The facts: Onofre's own case presented substantial age differences, with the younger man, whose complaint initiated the prosecution, being in his late teens and, according to the belated claim of the prosecutor at the Court of Appeals level, marginally retarded or otherwise impaired. The case had started on the theory of compulsory sodomy (with the consensual sodomy count being included, apparently as a fallback position). Pictures of the sex acts had been taken, which effectively removed the force claims but left open the argument that "privacy" was not involved. Onofre would not have been the perfect plaintiff in a civil case testing the constitutionality of the statute. In the Peoples, Goss and Sweat cases out of Buffalo, the determination was made that the
2. sex acts occurred in a public place, even if under conditions designed to attempt to conceal the acts. Additionally, Mary Sweat's reputation for prostitution was in the record and was pointed to by the Erie County prosecutor as further reason for the Court to give her short shrift.

(Note: The decision to defend Sweat and include her case in the appeals was made on the assumption that emphasis on the heterosexual potential for the statute as well as the homosexual might assist in overcoming any anti-gay bias in the Court. We would make the decision differently today than we did in 1979. Whatever gay hostility there is in the Court system would probably not be overcome by bringing a prostitute to the Court. The fact that the prosecutor refused to apply the statute to non-prostitute heterosexual situations prevented us from preventing the kind of

wholesome heterosexual defendant we would have liked to have presented.

2. Although we attacked the statute on its face, the prosecution attempted to read its own policy limiting enforcement considerations into the statute to make it a more reasonable sounding piece of legislation. The statute applied to any sodomy act (other than between husband and wife) whether occurring in public or in private. The Buffalo defendants attempted to present overbreadth arguments to support their right to argue the right of privacy, even though their acts did not occur in a private place. The argument was not readily accepted in the lower courts, although they ruled on the merits of the right of privacy (rather than speaking only as to the standing of the defendants to raise the arguments.)

After the trials in the Buffalo cases, we learned of the existence of the Onofre prosecution and presented an amicus brief to the intermediate appellate court there. Counsel on the cases cooperated (by the Buffalo cases being "slowed down" to permit the Onofre case to reacy the stage for appeal to the Court of Appeals). When all cases were ready to go to the state's highest court, sharing of briefs and information occurred. For the Buffalo cases, the presence of Onofre effectually eliminated the question of standing to argue privacy. From the other point of view, on the other hand, the presence of the Buffalo cases necessitated decision in Onofre under the Equal Protection Clause, as well as under the right of privacy doctrine, and made the ultimate result applicable to both alleged public acts of sodomy as well as to private acts. (See early footnote in the case dealing with this point.)

(Note: We have never argued that the State may not properly legislate as to public sex acts, only that the legislation should be non-discriminatory and not geared towards, or enforced only against, gay people. Actual experience over the past ten years before 1980 suggested that enforcement in Buffalo frequently involved perjury by the police who claimed to have seen, but in fact did not see, sodomy acts going on before their eyes. Removal of the statute has made such perjury much more difficult; some more heinous offence than the mere act was required, e.g. agreement to do the sex for money, making it prostitution. Alternatively, and before People v. Uplinger, arrest could be made under the loitering statute, a mere offense rather than a misdemeanor.

Given the generally accepted fact that the Onondaga County District Attorney would not have prosecuted Onofre in the first place if the only issue was that of consensual sodomy, it is interesting to contemplate what the state of the law in New York now would be if, instead of permitting dismissal of the forceful sodomy counts and continuing with the consensual sodomy count, the D.A. had simply consented to dismissal of the charges. The real hero of the whole development may be the alleged "victim", whose extravagant claims against Onofre led ultimately to the Court of Appeals' ringing decision on the privacy question.)

B. Importance of grouping claims, enveloping the issues. (See comments at page 3 above.) The intermediate appeals court decision in Onofre, if anything, gave a more ringing affirmation of the right of privacy with respect to variant sex forms than occurred in the later Court of Appeals opinion. After arguing broadly on both privacy and equal protection grounds, however, the Court's order at the end of the opinion seemingly limited the reach of the holding to acts conducted in private, not to public acts. (See People v. Onofre, 72 A.D.2d 268, 424 N.Y.S.2d 566 (4th Dep't 1980).) While this removed the philosophical support for arguments in other contexts that gays should be discriminated against because they were engaging in criminal acts all the time, by virtue of their lifestyle, it would have virtually no effect on actual police enforcement policies. This was the conclusion generally reached in the Buffalo City Court and purportedly the one intended by the appeals court (per statement by the writing judge to a lower court judge, cited to this writer in a Buffalo City Court proceeding by Judge Mazur). The perjury, harrassment and terrorizing of young gays, perhaps engaged in nothing more offensive (and not at all illegal) than hugging and kissing, with all of the potential for victimization that the statute allowed. We came away from the experience that an effective challenge to this kind of statute must not flinch from attacking it full-scale and broadsided. Anything less will result in a polite, judicially-imposed compromise, at the expense of people who can be readily stereotyped in terms offensive not only to straight people but also to much of the gay population itself. Note, also, that if a broader base for the Onofre holding had not been achieved at the Court of Appeals level, any attack on the loitering statute, a ready alternative for arrest, would have been virtually impossible.

C. Dealing with the issue in the context of a state-court, criminal case. From a gay-rights tactical perspective, how to present the issue of privacy and equal protection to the New York courts had been considered. A civil rights action would permit more effective selection ofthe party, with

judicial prejudices in mind. Disoovery would be available to demonstrate. Opportunity to introduce into the record appropriate socialogical and other considerations useful for a Brandeis-brief approach to the problem would more readily available. For what it is worth, we would be "on the aggressive" and not, by the nature of the process in a criminal case, defending allegedly wrongful conduct in an effort to avoid a finding of culpability and imposition of punishment.

But there are serious drawbacks to the civil case approach. If the plaintiffs face, in fact, little personal threat of damage from the sodomy statute, they may be without standing to raise the issue and, either at the trial level, or at an appeal level, the case may be dismissed on this basis. If, on the other hand, actual criminal prosecution is imminent, the federal courts will require that the issue be raised in the criminal case and not collaterally in a civil action. See generally Younger v. Harris, 401 U.S. 37 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Wade v. Buchanan, 401 U.S. 989 (1971), vacating and remanding judgment in Buchanan v. Batchelor, 308 F.Supp. 729 (N.D. Tex 1970), particularly as to the claims of the intervenors in the lower court case.

If such a result is overtly announced on that ground, little harm occurs; the issue remains for future litigation. If, however, the result occurs through a summary affirmance (e.g. Doe v. Commonwealth's Attorney, 403 F.Supp. 1199 (E.D.Va. 1975), aff'd 425 U.S. 901 (1976)) or through a determination of the absence of a substantial federal question (e.g. Pruett v. Texas, 463 S.W.2d 191 (1971), dis. 402 &.S. 902 (1971); Canfield v. Oklahoma, 506 P.2d 987 (Okla. Cr. App. 1973), dis. 414 U.S. 991 (1973); State v. Poe, 40 N.C.App. 385, 252 S.E.2d 843 (1979), cert. den. 298 N.C. 303, 259 S.E.2d 304 (1979), dis sub nom. Poe v. North Carolina, 445 U.S. 947 (1980)), the appearance of an adverse substantive determination by the Supreme Court (as in Doe) or that there are no substantial constitutional questions raised (as in the other cases) may arise, give despair to the gay community and mislead lower courts to results that are inappropriate. (Please see below, under "Supreme Court", as to how these considerations played in the decisions relating to the Uplinger cert. petition responses.)

Particularly in light of the Court of Appeals' comments in People v. Rice, but also in view of the other considerations mentioned, the issue was raised in New York in a criminal-defense context.

D. The primary motive to avoid the U.S. Supreme Court. Throughout the New York litigation process, a primary effort was made to attempt to insulatethe cases from U. S. Supreme Court review. It was felt that the Court was not yet ready for these issues, that the make-up of the Court at the present is too conservative to risk presenting the sodomy-law issue if it could possibly be avoided. (When, in Uplinger, the District Attorney presented his petition for certiorari in the particular way he did, a tactical response was evolved which seemed to some to be inconsistent with this policy, although it really was not. Please

SEE comments under the Uplinger case below.)

In the briefs submitted to the New York courts in all of the cases (including Uplinger), the courts were specifically requested to find unconstitutionality under both the United States and the New York Constitutions. If the Court of Appeals had acceded to this request, Supreme Court review would have been avoided under the "other adequate state-ground" exception to its jurisdiction.

In the Onofre cases, first the Buffalo defendants and then Onofre himself petitioned the Court of Appeals for rehearing specifically requesting that the court's determination be amended to add the State Constitution as a basis for the ruling. (The application was extraordinary and unusual, given that the rehearing was being requested by the successful appellants, not the unsuccessful prosecutors. It was later learned that denial of such a motion was inevitable, as in fact occurred [52 N.Y.2d 1072] and that the Court of Appeals would only grant such a request if the Supreme Court reversed the federal constitutional holding by the state Court. The Court of Appeals in New York has also indicated over the years its general unwillingness to find a right of privacy beyond that created by statute in the State, under the State's Contitution.)

The problem became moot when the Supreme Court denied certiorari.

People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62 (1983), cert. dis. sub. nom. New York v. Uplinger, _____ U. S. _____ (No. 82-1724) (5/30/84).

Without being specific as to the reasons, the New York Court of Appeals held thatthe loitering statute (Note 2) had to fall for the same reasons as the consensual sodomy law struck down in Onofre. A full range of constitutional arguments (free speech, due process, equal protection, etc.) had been presented.

The case, as it went to the Court of Appeals, involved two defendants: (1) Robert Uplinger, a Buffalo gay man who had invited an undercover vice cop home to engage in sex in a conversation on a public street, not heard by others than the cop and (2) Susan Butler, an alleged prostitute (without proof of payment) observed soliciting sex and later engaged in sex in a motor vehicle on a street. Butler was represented by the Public Defender's office in Buffalo.

The experience after Onofre was simply that all arrests that used to be made under the consensual sodomy law now occurred under the loitering law. The fact that the latter was only an offense meant little. Sentencing practice did not normally include jail anyway; the violation status of the

offense limited the fine to $250, a level customary with usual sentencing under the sodomy law anyway. The real detriment -- the harrassment and terror of arrest and potential exposure to family, employer and friends and the mark on the individuals record -- remained.

The principal tactical premise was that without the support of the illegality of the object act, sodomy, the loitering law could not stand. The prosecutor's insistence was that as long as the idea was so "offensive" to the community as a whole, it could be outlawed and that the Legislature's determination of the "offensive" character of the conduct was not reviewable.

Tactical considerations in handling the Supreme Court review process:

The District Attorney stated the question in his petition for certiorari:

"1. Does New York State Penal Law §240.35-3, Loitering for the Purpose of Engaging in Deviate Sexual Intercourse, represent a valid exercise of the State's Power to control public order?

"2. Is New York State Penal Law §240.35-3 violative of any rights protected under the United States Constitution?"

In Footnote 1 to the Petition, however, he further stated:

"1. To the extent that the decision in the present case predicated upon People v. Onofre, supra, and represents an improper extension of an unfounded decision, petitioner requests that in the event certiorari is granted with respect to the loitering statute, that review also be granted with respect to the consensual sodomy provision."

Nowhere else in the petition was the request of that footnote further mentioned.

Under the circumstances, what did the situation present us procedurally?

1. Would a grant of certiorari without comment leave the Onofre issue before the Court? If the District Attorney chose not to mention the issue further except in the same parenthetical manner he had in this petition, would the Court have the power to decide the issue, even if it had not been adequately briefed? (Ultimately, four justices answered that question in the affirmative so the problem was obviously not insignificant.)

2. Worse yet, was there danger that the Court might summarily reverse, without opinion, leaving the issue of the continued viability of Onofre beclouded? (Such a result was experienced in a New York case

> before me at the time; certiorari was granted and the decision below was reversed summarily, without argument.) A variation of the problem would be the grant of certiorari and the summary reversal not only of Uplinger but also Onofre, leaving no doubt as to extent of the disaster.

The potential that we would be "sandbagged" -- denied everything without even having a chance to be heard on the merits -- was preeminent in our concerns at that time. The tactical choice was to argue that Uplinger was routine if only viewed in its particular context and with Onofre being a premise and not an open issue. On the other hand, the issues in Onofre were important and if the Court was ready to hear them, the case was important. At the time the Uplinger response to the petition was written and filed, the Legal Aid Bureau elected not to file a response for Butler and the potential for summary reversal was not present in our mind.

Several weeks later, however, the Court called for a response on behalf of Butler and the potential for mischief under the various decisions finding the "absence of a significant federal question" became apparent. (See decisions at page 5 above.) After a hasty trip to Washington to examine original records in the various cases at the Supreme Court, we wrote the brief for Butler which Legal Aid adopted. Here, the argument was more explicitly set out that the prior summary determinations by the Supreme Court had not preempted the underlying issue of Onofre and that if the Court intended to rule on the merits of that case, full argument should be allowed, in contrast to any summary determination of the merits.

Handling of the appeal after grant of certiorari. As suspected after the Court called for a brief for Susan Butler, certiorari was granted. Again, given the failure of the District Attorney to pursue his attack on Onofre, a decision had to be made as to how to avoid the "sandbagging" problem. The issue had been presented in the original petition. More importantly, it was implicit in the language of the Court of Appeals Uplinger decision itself. An at least plausible interpretation of that decision was that it (1) reaffirmed the holding in Onofre and (2) applied it to a fact situation not directly before the Court in Onofre. The risk of not addressing the Onofre issue at least conditionally seemed unacceptable to us (and to man of the amici).

The important point, we believe, is that a broad spectrum of amicus briefs were presented, taking different, sometimes diametrically opposing points of view. The California brief was one, for example, which Uplinger could not adopt; the importance of its inclusion in the array of briefs before the Court is obvious. We are convinced that the strength of the overall presentation was enhanced by the spectrum of varying views before the Court in the various amicus briefs. The point needs to be remembered.

The Altered Philosophical Premise in Uplinger. Although the premise in the Onofre cases was to state the cases in their broadest terms--to claim the maximum base for judicial relief (see page 4 above), Uplinger called for a different approach. Whereas Onofre involved the sphere of privacy, where no compromise position could be brooked, and the equal protection argument, where any legitimate concerns could be handled by new, properly drawn statutes or by enforcement of all other applicable laws already on the books, the Uplinger fact pattern involved some public activity which, if carried out in an annoying way, could properly be regulated and could hardly be defended. The job was to distinguish between acceptable and unacceptable behavior and pitch the argument on the former, not the latter. Thus, Uplinger rejected any arguments flatly claiming the right to solicit in public as being necessary to aid in the realization of the constitutional right established in Onofre (although this argument was suggested in some of the amicus briefs). Such a broad claim to protection would be similar to the right of abortion advocates to advertise their services under an unqualified application of the First Amendment. The courts, we felt, were not going to apply such rights to "advertise" sexual opportunities. This involved a concession that the degree of constitutional protection is to a limited extent measured by the subject matter of the protected communication involved. Sex is not as freely communicated as are religious opinions.

The decision made was to present as narrow a claim to protection as the facts would warrant and the situation require. Hence, the emphasis on the absence of factual offensiveness of the behavior as being the linchpin on the question of the right of the State to regulate.

THE NEW YORK RESULTS OF THE EFFORT:

1. Both the consensual sodomy and loitering laws are gone . . . and good riddance!

2. Interest in replacing the consensual sodomy law with some constitutional alternative--expressed by the Buffalo police as soon as Onofre was decided--went nowhere. Similar expressed views of the Erie County District Attorney to replace loitering statute struck down in Uplinger may have a similar fate. One conservative local legislator has apparently told the prosecutor he will not touch it; it is too "touchy" an issue. Noone wants to repeal these laws; neither do they want to become a blue-nose crusader. Time will tell whether this is the last word on the subject.

The Buffalo police are reduced to using other statutes if they can twist the situation into their ambit (e.g. prostitution laws if the defendant can be tricked into agreeing to accept money, just $5.00, for example) or local ordinances which may apply but have little sexual overtones (e.g. discriminatory enforcement of the Buffalo ordinance prohibiting presence in a City park after 10:00 P.M.; enforced only against gay men and, on occasion, against others who incur the special wrath of the arresting officer; gays are always arrested; others are simply told to leave the park.) Where possible, the police use public lewdness as a statute of choice for prosecution. The broad discretion previously available is gone, however, and the opportunity for perjury similarly reduced.

A Special Note on the Client-Representation Aspect of the Effort.

In all instances (except as to Mary Sweat herself; she took little interest in what was happening), the personal interaction of attorney and client was critical. Not just legal issues were being dealt with, but the client's psychology as well: his family relations, his fears of exposure, his distrust and suspicion of the court system, his occasional uncertainty whether the attorney was handling everything appropriately or going down a road where unanticipated hazards awaited. In one instance, a public job was lost and union contract litigation had to be started which, at the end of the grievance-procedure stage, resulted in recovery of the job with full back-pay. It was a fulfilment of the basic commitment at the beginning: "If you decide to take this step, I cannot take away the risk of publicity and jail, although the latter risk is small in my opinion, but I will stay with you until the end, even if it goes to the United States Supreme Court." If the situation required that the attorney meet with family members, that had to be done and was done.

And, more difficult, was the realization that the effort was a joint effort between attorney and client. Always, as must necessarily be the case, the client had the power to discharge the attorney (never mind that the attorney was working pro bono and had put in a huge investment of effort and energy) and require the case to be terminated. This ultimate control of any test case resides in the named client-party. It is his name he reads in the newspapers all the time. He is the one who lives the consequences of the publicity and notoriety. He can insist that it stop, however disappointing the result to others. (One female, alleged prostitute client withdrew from the Uplinger case after the intermediate appellate court process for just such reasons as these.)

These considerations import a number of considerations:

1. The client must be chosen well; a good personal rapport and trust must exist between client and attorney and must be nourished throughout the representation.

2. If it is feasible and will not dilute the value of the case or the fact pattern propounded to the courts, more than one client should be represented; the withdrawal of one will not then kill the case.

3. The attorney anxious to preserve the case as a legal-issues vehicle must exercise extraordinary concern and tact for his client's problems, frustrations and concerns--not just be a good legal technician. This may include "bringing the client along", reviewing proposed briefs and procedures with him with great care, having him feel that he is part of the decision-making process in his, not just a fixture who has allowed his name to be used and has no control over his life while the case goes on.

Conclusory Remarks

This writer believes that some broad premises are applicable and should be credited in most circumstances. Obviously, these are just personal opinions of one person who has been involved and carry no special authority beyond that.

1. Where a state's political philosophy and judicial position provide an inviting opportunity (as evidenced in New York by the People v. Rice opinion), a full-scale attack on privacy grounds and/or equal protection grounds should be launched. Any such attack should be fundamentally unembarrassed by adverse factual patterns (avoiding, however, cases where the underlying acts were apparently by force, only the ultimate judgment being for consensual acts). The fact alone that the acts occurred "in public" should not be a problem. (Commonwealth v. Bonnadio in Pennsylvania involved sex acts in front of a large audience in a theater, but important changes in that State's law resulted from the challenge.)

2. In states where the legal climate is not inviting, a "Half-a-Loaf" approach, based on statutory interpretation or procedural grounds may be more appropriate, seeking limited decisional victories for the immediate future rather than a full, long-term fix.

3. Until the prospects for favorable Supreme Court review are more favorable, every effort should be made to keep cases from going to the United States Supreme Court. This effort can include:

   (a) Relying on available state-law grounds where that is possible;
   (b) Refraining from appealing adverse decisions where that is not inconsistent with obligations undertaken to the client or where a clear path to success on the appeal cannot be foreseen;
   (c) Where cert. is granted on the application of, or appeal is taken by, an adverse party to the U. S. Supreme Court, cooperating with other groups and interested persons in the country in finding a way to avoid the appeal, if possible, or, at least, to assure effective presentation through amicus briefs on the merits;
   (d) Accepting the worth of diversity of opinion among us.

The best support may come from those apparently working "against" you. The contra brief on a petition for certiorari from a fellow gay-rights activist, where you have petitioned for cert., is presumably made in a good-faith effort to protect the same

gay-rights values that you are fighting for. The diverse approach taken by a brief of an amicus on the merits may be the argument that wins the case for your client (if only by avoiding reversal of the victory below), although on an argument basis which you could not take in the main brief.

4. Above all, the issues and law here involved are complex and involved. Those who seek to become involved in them, whatever their general background in civil liberties, pro bono or other work may be, must realize that there is a serious and specialized subject matter here which cannot be picked up in a hurry or "on the way to court" (as much litigation in private practice is done because of the press of time and competition of other cases). It is all available information, but the commitment of time and effort needed to avoid doing great disservice to millions of involved people is daunting. We must, however we can, dissuade people from believing that this is an interesting area to work in and make some points for one's career, unless that person is willing and capable of undertaking the serious learning process involved, dealing with people around the country who have informed knowledge and opinions and accepting the humbleness that the issues require.

(The foregoing paper has been prepared for distribution at a Litigators' Conference being held on July 30, 1984, at the 5th Floor Conference Room in the ACLU Building, 132 West 43rd Street, New York City, to consider sodomy-reform issues.