one

magazine

THE HOMOSEXUAL VIEWPOINT

YOU AND THE LAW

by aclu attorney

14TH YEAR
SEPTEMBER 1966
FIFTY CENTS

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Founded October 15, 1952

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magazine

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ONE IN CHICAGO

Is now permanently established. The "Outreach Program" of ONE's Social Service Division has since its February 23, 1963 meeting of the Council of Friends of ONE in Chicago been developing plans for regular ONE activities there. Such meetings are now being regularly held. Anyone in the Chicago area who would like to join with the Friends of ONE under the mature and responsible leadership which ONE represents may secure further information by writing: Director, Social Service Division, ONE, Incorporated 2256 Venice Blvd., Los Angeles, Calif. 90006

EDITORIAL

Your Rights in Case of Arrest

One of the greatest dangers that the homosexual faces is ignorance of the basic rights he is guaranteed by the law. Much education is needed in this area in order to overcome fear, and to guard against illegal search and seizure and illegal arrest.

There is evidence in almost every State in the Union that persons are often seized without warrant, denied the right to post bail and prevented from contacting the outside world or a lawyer. This despite the guarantee of the 14th Amendment to the Constitution which declares: "Nor shall any state deprive any person of life, liberty, or property without due process of law."

In some cities arrests are made on trumped up charges of "suspicion of vagrancy and disorderly conduct" to bring people in for questioning.

What recourse do victims of such happenings have? They may bring a suit against the police for violation of constitutional rights. Another means is to complain to the police commissioner. A third means is to appeal to the courts for reversal of a conviction that resulted from illegal arrest.

Following are your rights in case of arrest. If some of the advice, formulated by competent legal counsel comes as a surprise, it serves again to remind us of the general ignorance of the law. ONE suggests study of these points; you might even want to carry them with you in your wallet.

1—If an officer tries to arrest you, he should have a warrant, unless a misdemeanor (minor violation) or a felony (serious violation) has been committed in his presence, or he has reasonable grounds to believe that the person being arrested is guilty.

2—If he has no warrant, ask what the charge is. If it is not as explained to you in #1 above, go along but under protest made before a witness if possible. DO NOT RESIST PHYSICALLY.

3—Give no information. You may, but you do not have to give your name and address. Do not talk to any policeman.

4—Q—Why did you commit this crime?
A—I'm not guilty and I'd like to see my lawyer before making a statement.
Q—How long have you been a lewd vagrant?
A—I'm not guilty and I'd like to speak to my attorney, please.
Q—Have you been arrested for this before?

A—I'm not guilty and my attorney would rather I speak through him.
Q—Nice day isn't it?
A—I'm sorry but I'd like my lawyer's advice before making a statement.

5—Deny all accusations with, "I'm not guilty, and I'd like to contact a lawyer." Otherwise your silence before witnesses could be construed as consent in court.

6—If an officer insists on taking you to jail, ask when you are booked (registered) what the charges are.

7—Insist on using a phone to call your family or a lawyer.

8—Do not sign anything. Take the badge numbers of arresting officers.

9—You have the right to be released on bail for most offenses. Have your attorney make arrangements. Or you can ask for a bail bondsman. For a fee he will post (deposit with the police) the amount needed for your release.

10—Under no circumstances do the police have the right to manhandle, beat, or terrorize you. REPORT ALL SUCH INCIDENTS.

11—If you do not have a lawyer by the time you plead guilty or not guilty, remember this: You are entitled to a lawyer. Ask for a postponement until you get legal representation.

12—PLEAD NOT GUILTY.

13—Ask for a trial by jury unless your lawyer advises otherwise.

14—You are not required to testify against yourself in any trial or hearing.

15—If you are questioned by a member of the FBI you do not have to give an answer. Contact your lawyer immediately so that your rights can be protected.

Alison Hunter
Women's Editor

DER KREIS / LE CERCLE / THE CIRCLE

Monthly magazine, half in German, the other half divided between English and French. Liberally illustrated with photographs and drawings. Articles, stories, poetry. Oldest of homophile publications. $11 first class. Send only bank draft or cash, no postal orders to:

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Victory!

SUPREME COURT UPHOLDS HOMOSEXUAL RIGHTS

There have been those homosexuals during ONE Magazine's struggling existence who have been sceptical of the results of our efforts. Without the aid and often with the ill-will of these and other individuals, we have continued to propagandize in favor of the homosexual—attempting to bring about understanding, acceptance, and status for the group, to chart its history, to report through news and fiction and science etc. the growth of the movement, the position and place and lives of homesexuals everywhere.

There have been others, of course—thousands of loyal friends and supporters who have stood up fearlessly and allowed themselves to be counted, who believed in themselves as homosexuals and in the not always tangible works of ONE. To these "proud and unashamed" homosexual men and women go the glory of the January 13th decision of the U. S. Supreme Court in favor of ONE Inc. vs. the U. S. Post Office on the matter of homosexual obscenity.

By winning this decision ONE Magazine has made not only history but law as well and has changed the future for all U. S. homosexuals. Never before have homosexuals claimed their right as citizens. Not even the Berdache, nor the Greeks, nor the Napoleonic Code, nor Wolfenden "recommendations," nor The American Law Institute "recommendations" have managed to mean so much to so many. ONE Magazine no longer asks for the right to be heard; it now exercises that right. It further requires that homosexuals be treated as a proper part of society free to discuss and educate and propagandize their beliefs with no greater limitations than for any other group.

By simply not finding ONE Magazine obscene, the Supreme Court has completely and unanimously reversed the Post Office ban on the mailing of our October 1954 issue which is immediately once again available both on news stands and on order directly from us. The Supreme Court has also reversed the evil and immoral wording of the ruling of Judge Thurmond Clarke and later that of Appellate Judges, Barnes, Hamley, and Ross. The decision has further dealt a blow to the censorship activities of Los Angeles Postmaster Otto K. Olesen. The New York Times has this to say about the decision: "The court today reversed a post office ban on a magazine, One, which deals with homosexuality. The petition for review filed by the lawyer, Eric Julber of Los Angeles, had apparently raised only one question: was the magazine 'obscene' within the statute banning importation of obscene matter? The court's order appeared to answer: No.

"The decision, so interpreted, means that the Supreme Court is insisting on a rigorous, narrow definition of 'obscenity.' It means, as one lawyer put it, that 'the court is going to keep a real weather eye out itself to prevent censorship of anything but what might be called hard-core pornography'."

We wish to express our sincere thanks to each and every person who helped through contributions, through encouragement and in other ways to make possible this great victory.

The following is the second in a series of articles by ONE's legal counsel on aspects of the law deemed by the Editors to be of interest and importance to ONE's readers. Other articles in this series will follow in subsequent issues.

THE LAW

A DISCUSSION OF ENTRAPMENT

"Police officers are empowered to capture criminals, not to **create** them."

These words, used in an early leading case on entrapment, have formed the basis of much subsequent legal discussion on the topic. The law of entrapment is one which is still not fully clear in the law; it has many contradictions; and it is particularly baffling to and subject to misunderstanding by laymen.

It is important to grasp first one fundamental concept: that "entrapment" is **not** a crime. With certain exceptions an officer who entraps a defendant into the commission of an offense he would not have otherwise committed is not guilty of a crime, at least under State law. He is merely overactive in procuring arrests. Perhaps, under such circumstances, he may be liable to the defendant in a civil action for money damages; but he has committed no **crime**.

What, then is the much-discussed "entrapment"? It is a **defense**, to be raised by an accused. One who has committed an offense is permitted to raise as a defense the fact that the idea of the offense did not originate in his mind, but that he was lured, persuaded, duped or seduced into acts he did not intend to commit by an over-zealous police officer.

The defense of entrapment is an old one in the law. It existed in common law in England, centuries ago, and has always been a part of American law. A famous series of "entrapment" cases in American histotry arose during the last century, when over-zealous liquor-enforcement officers used the following device: they swore in as a deputy and one of their number a full-blooded Indian, but one who was indistinguishable from a white Caucasian. The Indian deputy would go into a bar, order a drink, and, having been served, arrest the bartender for having sold liquor to an Indian in violation of law. These convictions were reversed.

A statement of the general rule in modern law is: "Where police officers incited, induced, instigated or lured the accused into committig an offense which he otherwise would not have committed and had no intention of committing, entrapment exists and the defendant, though he has committed the offense will not be convicted."

On the other hand, this statement of law is always qualified with another: "It is not a defense that an officer has set a plan to capture a criminal, and to secure evidence of guilt against him, or has created circumstances in which the criminal can commit the offense."

Or, as it has sometimes been stated, the critical point is: **In whose mind did the crime originate, the officer's or the defendant's? If in the mind of the latter, no entrapment exists.**

It will be obvious to the perceptive reader of these statements that the question of where the line is to be drawn is a very difficult one indeed, and often not capable of determination except by the intuitive feelings of a judge or jury. Perhaps an analysis of the types of cases in which entrapment claims are frequently made will illustrate the problem more clearly.

1 — The first situation is that where an officer offers to buy a prohibited article, and the defendant is willing to sell. This can arise in narcotics cases, liquor cases, or in prostitution. In these cases, it is no defense that the officer disguised his identity. Where the defendant is motivated by a desire for money, there is no entrapment by an officer who offers money.

2 — The second type of case involves more active activity on the part of the officer. He may secure the confidence of a thief and loan him a gun with which to commit a robbery; he may pretend to be an accomplice; he may take narcotics into a city and thereby attract narcotic peddlers anxious to buy. In these situations, the officer creates situations which make it easier for a criminal to commit an offense which he seeks an opportunity to commit. The idea for the offense has, however, originated with the defendant.

3 — In the third situation, the officer suggests the commission of the crime. He overcomes the defendant's unwillingness by threats or appeals to sympathy, pity or friendship. In this situation, entrapment exists. (For example, in a famous case, a prostitute induced a man to live with her outside of wedlock. She had been hired to do so by police, who arrested the man for violation of a morals law. It was held the man had been entrapped.) But in this situation, the proof of the defendant's reluctance must be clear and overwhelming. CASES ARE EXTREMELY RARE IN WHICH A CLAIM OF ENTRAPMENT IS SUCCESSFUL AS A DEFENSE.

In situations of homosexual life, we can apply the law as obtained from the above situations and lay down the following general rules, dependent in each case, of course, upon the particular facts:

It is obvious that, for instance, a homosexual who makes the acquaintance of a strange man, perhaps in a public place, and proposes to him the commission of an illegal act, cannot urge the defense of entrapment, even though the stranger was a vice-squadder "staked out" as a decoy to attract such defendants.

If, in the same situation, it was the vice-squadder who proposed the illegal act, the same would be true. A MERE SOLICITATION BY A VICE SQUAD OFFICER DOES NOT CREATE ENTRAPMENT. These cases are similar to situation (2) above: the officer has merely created a situation in which a defendant can commit an act with more ease.

Only in the third situation can entrapment truly be claimed: If the officer "picks up" the defendant, gains his acquaintance, proposes the act, and proceeds to overcome the defendant's genuine reluctance and unwillingness by appeals to sympathy, pity, friendship, etc., entrapment exists, but IF, AND ONLY IF the defendant was in fact unwilling, and the officer's appeals were such as to leave no doubt that he was the procuring party.

To prove such a state of fact requires a strong degree of proof; obviously, the defendant is forced to take the stand in his own defense, and his version of the facts must be so strong and believable as to convince a judge or jury of its truth and validity.

YOU & the LAW

by J. B. Tietz

The following article reproduces in full a paper delivered at ONE's Annual Midwinter Institute, during the morning session, January 26, 1957. The author, a heterosexual Los Angeles attorney, has for the past ten years been treasurer of the Southern California Chapter of the American Civil Liberties Union.

The original version of this paper was read to an open staff meeting of the Cedars of Lebanon Psychiatric Clinic. I shared the platform with a psychiatrist and, since I believe you will be interested in the two opening paragraphs of his paper, and because I have plans for an expanded revision of my own paper, I am prefacing my discussion by his opening comments.

Homosexuality is as ancient as man. It has been noted among earliest primitive cultures. The Tahitians, the Negroes of Zanzibar, the Indians from the Eskimos of Alaska to the coastal regions of Brazil, the Papuans of New Guinea, and the primitive Australians have had homosexual customs that were frequently related to their religious practices. Many ancient cultures accepted homosexual practices for methods of birth control, during military activity, and religious rites. The Egyptians, Greeks, Carthaginians, Scythians, Normans, Celts, and Tartars openly practiced homosexuality. The Hindu and Judaic-Christian cultures, however, have always looked with abhorrence on these methods of sexual expression and have forged severe taboos and severer penalties against it. But in spite of edicts, exorcism, excommunication and over-zealous punishment, homosexuality has survived. And it has remained, as it has always been, ubiquitous, involving about two percent of the population of the world, hurdling over geographical, racial, social, legal, economic, intellectual, national and occupational barriers, and remaining an immutable constant.

While society made pious attempts to stamp our homosexuality with fire, sword, imprisonment, intimidation and social opprobrium, a small group of philosophers, artists, writers and scientists speculated concerning its nature. These incredible Greeks again evolved a conception that is the basis of our modern scientific theory. The sculpture, literature, mythology, philosophy and ethics of the Greeks revealed man's nature as organically bisexual. Over 2,000 years later, the theory of organic bisexuality was revived by the philosophers Hossl, Ulrichs, and Schopenhauer. Darwin and other evolutionists were able to postulate latent bisexuality and gave a firm scientific base for the previous speculations. Krafft-Ebing, Moll, Westphall, and Hirschfeld, working in the field of clinical psychiatry, were able to collect clinical evidence for this hypothesis. Finally embryologists, physiologists, and biologists confirmed the organic bisexuality of man and were able to demonstrate experimentally that this may account for man's homosexuality.

The term homosexuality was originated by a medical writer in 1869.[1] Although it is presently a commonly accepted and precisely defined term among the medical profession, this is not yet true in the legal profession.

A search of the index to the entire statutory law of California failed to disclose a single use of this term. A search of the penal code provisions of

several other states, applicable to sex offenses, likewise failed to disclose an instance of its use.

The law, however, is and always has been very much aware of homosexuality, that is, sexual practices between two human parties of the same sex.

The state statutes on our subject are generally a single, short paragraph. They prohibit all unnatural sexual practices, a prohibition that, by reason of the definitions used by American courts, includes certain heterosexual acts and bestiality. This naturally has led to some confusion of thought and terminology. Some time ago a city prosecutor stated to me that he had just had one of the most interesting homosexual cases of his career and then proceeded to relate a case of bestiality, that is, a situation that involved an animal.

In this paper, I have used the phrase "unnatural sexual practices" chiefly because it is the ordinarily found expression in the opinions of the judges. I trust it will stir up no quibbling discussion, for it can be said that it is unnatural for man to fly and when so used, the expression arouses no argument.

The wide scope of the statutes is revealed by their very titles: The applicable Ohio statute is headed "Sodomy"; the Utah statute is headed "Sodomy - unnatural and detestable practices;" the Virginia statute is headed "Crimes against nature;" the California statutes (for we, uniquely, have two separate statutes) are headed "Crime Against Nature," and "Sex perversions."

In this discussion we are concerned only with sexual practices between human parties of the same sex. Pedication, fellatio and cunnilingus are, of course, embraced in this definition. Many forms of masturbation and use of various surfaces of the body, such as the armpits, are not; for an essential element of this crime, like the crime of rape, is penetration.

The enforcement of the law, in actual practice, is concerned almost solely with male offenders; one medical legal writer, Herzog, in a book written in 1931, says he never heard of a prosecution of female homosexuality but he points out that the statutes are broad enough to cover at least one form, namely cunnilingus.[2] Henry, in his two-volume work, has an illustration by Dickinson showing the use of a contrivance labelled a Double Dildo. The use of this device undoubtedly brings both participants within the definition of the crime. Actually, in Los Angeles city, there are a dozen arrests a year of female homosexuals. They generally plead guilty and I have therefore been unable to find a single instance of a female homosexual appeal from the many score of homosexual cases that are reported in the Appellate records.

The legal history of homosexuality is very old.

In Leviticus XX;13 we find, "If a man also lie with mankind, as he lieth with a woman, both of them shall have committed an abomination; they shall surely be put to death; their blood shall be upon them."

Leviticus makes a clear distinction, in definition, between homosexuality and bestiality and does it very succinctly. Two verses after the above quoted one, we find: "And if a man lie with a beast he shall surely be put to death, and ye shall slay the beast," and the following one: "And if a woman approach unto any beast, and lie down thereto, thou shalt kill the woman, and slay the beast."

The ancient origin of our legal concept is emphasized by some of the words used. Sodomy, or male homosexual love, is derived from one of the Scriptural twin cities of Sodom and Gomorrah; Lesbianism, or female homosexual love, is named after Lesbos, the ancient name for the Greek island of Mitiline; the Greeks also have given us a synonym for pederasty, "Socratic" love.[3]

The more modern legal handling of the problem was just as harsh as that of the ancients and has the following history:

Early in the Christian era the Roman Emperors legislated against homosexuality and Justinian's Code, in 538, condemned offenders to the sword; this became the foundation of social opinion and legal enactment for the next 1,300 years.

During the Middle Ages the problem of sex variants was dealt with in the same manner as that of heresy and witchcraft. Havelock Ellis states that in 1750 two pederasts were burned in France and that only a few years before the Revolution a Capuchin monk was also burned.

All during these 1,300 years the sin and sacrilege of sodomy was the ground for the imposition of punishment. The Church had a maxim, "Sodomy is high treason against the King of Heaven." The fact that it was considered a religious offense is most likely the reason the Code Napoleon omitted punishment for it.

The modern French law makes a clear and logical distinction between crime on the one hand and vice and irreligion on the other, only concerning itself with crime. Homosexual practices in private, between two consenting adult parties, whether men or women, are absolutely unpunished by the Code Napoleon and by French law of today. Only under three conditions does the homosexual act come under the cognizance of the French law as a crime: (1) When there is public outrage, i.e. when the act is performed in public or with a possibility of witnesses; (2) When there is violence or absence of consent, in whatever degree the act may have been consummated; and (3) when one of the parties is underage, or unable to give valid consent.

This method of dealing with unnatural offenses has spread widely, at first because of the political influence of France, and more recently because such an attitude has commended itself on its merits. In Belgium the law is similar to that of the Code, as it is also in Italy, Spain, Portugal, Roumania, Japan and numerous South American lands.

English speaking authorities on the subject are in general agreement with this philosophy, and, although our statutes lag behind, our law enforcement officers, as I will later show, generally try to observe these logical distinctions.

As Havelock Ellis points out,(4) the question of homosexuality is a social problem. Within certain limits, the gratification of the normal sexual impulse, even outside marriage, arouses no general or profound indignation and is regarded as a private matter; rightly or wrongly, the law regards the gratification of the homosexual impulse as a public matter. The law is in accord with what seems to be public opinion. Thus it happens that whenever a man is detected in a homosexual act - however exemplary his life may previously have been, however admirable it may still be in all other relations - nearly every ordinary normal citizen, however licentious and pleasure-loving his own life may be, feels it a moral duty to regard the offender as hopelessly damned and to help in hounding him out of society.

Alfred W. Herzog, when editor of the Medico-Legal Journal, said:

"Whether indulgence in a certain act of homosexual intercourse was an irresistable or controllable impulse may be difficult to determine.

"We should, however, say that every homosexual is mentally abnormal by nature and should not be held responsible for his sexual inclinations and an occasional indulgence therein, except he thereby offends common decency or induces children to submit to his sexual practices." (5)

Ellis expresses the opinion(6) that legislation against homosexuality "has no clear effect either in diminishing or increasing its prevalence."

In England the law is exceptionally severe; yet, to again use Ellis as an authority, according to the evidence "of those who have an international acquaintance with these matters, homosexuality is fully as prevalent as on the Continent; some would say that it is more so. Much the same is true of the United States, though there is less to be seen on the surface. It cannot, therefore, be said that legislative enactments have very much influence on the prevalence of homosexuality. The chief effect seems to be that the attempt at suppression arouses the finer minds among the sexual inverts to undertake the enthusiastic defense of homosexuality, while coarser minds are stimulated to cynical bravado."

But, while the law probably has had no more influence in repressing abnormal sexuality than, whenever it has tried to do so, it has had in repressing or making unpopular the normal sexual instinct, it has served to foster another offense. What is called blackmailing in England, chantage in France, and Erpressung in Germany - in other words, the extortion of money by threats of exposing some real or fictitious offense - finds its chief field of activity in connection with male homosexuality.

Hirschfeld states in an interesting study of blackmailing(7) that his experience shows that among 10,000 homosexual persons, hardly one falls a victim to the law, but over 3,000 are victimized by blackmailers.

If Hirschfeld is correct, it is apparent a very small proportion of homosexuals are prosecuted. This undoubtedly is so. Yet there are over 200 arrests in the city of Los Angeles each year on P.C. 288 A, the most serious of the sections, and there are several score reported cases. Since my audience is composed of non-lawyers, I will explain how a case comes to be "reported."

There are four steps: First, the legislature enacts a statute. Next, the law enforcement officers, that is, police and prosecutors, make arrests and prosecute - often exercising considerable judgment, that is, they themselves decide whether or not to arrest or to prosecute. The case is brought to the trial court, that is, the court that tries those who are prosecuted and sentences those who are convicted. The decisions of trial courts are rarely "reported," that is, embalmed in books for posterity to read. Of course, statistics may be kept but individual decisions are rarely written up. Should the losing party in the trial court have the interest and the means to further contest the matter, he perfects an appeal, that is, he takes the case to the appropriate appellate court. The decisions of the appellate courts are almost uniformly set forth at length in consecutively numbered and dated books which are called "Reports." The facts are reviewed and reasons for the appellate court's conclusions are given. Appellate court decisions are binding on all lower courts in the particular jurisdiction.

We will now consider in more detail the four steps above outlined. First, the applicable statutes:

"California Penal Code Section 286. (Crime against nature: punishment.) Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the State prison not less than one nor more than ten years."

Since the sections are short, I will also read two definitive, in-between ones that are pertinent to our subject:

"Section 287: Penetration sufficient to complete the crime. Any sexual penetration, however slight, is sufficient to complete the crime against nature.

"Section 288: (Crimes against children: Lewd or lascivious acts: Punishment.) Any person who shall wilfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison for a term of one year to life.

"Section 288a: (Sex perversions: Punishment.) Any person participating in the act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the State prison for not exceeding fifteen years." This section read, as just quoted, until the last several sessions of the legislature, when to the above was added the following:

" . . . or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true that he is more than 10 years older than his coparticipant in such an act, which co-

participant is under the age of 14, or that he has compelled the other's participation in such an act by force, violence, duress, menace, or threat of great bodily harm, he shall be punished by imprisonment in the State prison for not less than three years. The order of commitment shall expressly state whether a person convicted hereunder is more than 10 years older than his coparticipant and whether such coparticipant is under the age of 14. The order shall also state whether a person convicted hereunder has compelled coparticipation in his act by force, violence, duress, menace, or threat of great bodily harm. (Am. Stats. 1st Ex. Sess. 1950, ch. 56, Section 1; Stats. 1st Ex. Sess. 1952, ch. 23, Section 3; Stats. 1955, ch. 274, Section 1.)"

Section 288a was enacted by the legislature because one of our Supreme Court decisions(8) held that Section 286 covered only acts of pedication (both human and bestial) but did not cover fellatio.

When the first version of Section 288a was enacted in 1915, declaring fellatio and cunnilingus felonies, it was declared unconstitutional on two grounds: one, because our constitution requires all statutes be in the English language and, second, because it lacked a definite technical meaning, that is, it sometimes was used to refer to both the passive and the active party.(9)

Thus we have the present Section 288a, passed in 1921, which I just read. Its constitutionality has been upheld against the attack of vagueness and uncertainty.(10)

There are a few other code sections I should at least mention, for you should know of their existence. The legislature ten years ago added a provision(11) that all persons ever convicted of any type of sex offense must register with either the county sheriff or the local chief of police.

There are also the Welfare and Institution Code Sections(12) providing for the determination of sexual psychopaths and for their incarceration in State mental hospitals.

Next, we will look at enforcement of the penal statutes. After a police officer arrests the suspect the problem becomes one for the District Attorney, the county law officer having the responsibility of prosecuting violations of State statutes. If he thinks a prosecution under one of the felony sections I have just read is not indicated, for any one of several reasons, he still might issue a felony complaint on the reasoning that the defendant will thereby be induced to plead guilty to a misdemeanor, that is, a lesser charge. For example, prosecuting attorneys are generally willing to accept a plea of vag-lewd (lewd vagrancy) when the act and circumstances do not involve children, public outrage or violence. The District Attorney's office often anticipates such an outcome and where the offenders are both mature men and the offense not too public, they will not file a felony complaint but will turn the matter over to the city prosecutor where a misdemeanor complaint or vag-lewd complaint is issued.

Next we come to the trial courts. The philosophies of the trial judges are varied and they range all the way from ignorant leniency and ignorant savagery to the same views on punishment entertained by psychiatrists.

The final phase of judicial procedure is the appellate court. The California homosexual cases reported are surprisingly many. Not all questions, however, have been decided. For example, there is not a single reported female homosexual case.

Although the appellate courts have not construed the statutes with respect to female homosexuals, the prosecutors and the trial judges entertain no doubts on the equal applicability of the statutes and so apply it in the comparatively few female cases that arise.

Time limitations forbid more than a few glances at the considerable body of law on our subject that has been written by our reviewing courts:

First, proof of the act. In the absence of eye witnesses, it has been held that foreign substances such as sperm or fecal matter are proofs that support a judgment of conviction. Anal lacerations and foreign lubricants are not infrequently used as corroborative evidence.

Where eyewitnesses are used the usual criminal law rules with respect to accomplices apply. That is, the uncorroborated testimony of an unwilling partner will support a conviction, but the uncorroborated testimony of an accomplice will not, as in all criminal cases, testimony of an accomplice must be corroborated to sustain a conviction. Who is an accomplice is a question for the jury under proper instruction from the court. A few years ago there were three important decisions on this point. Briefly, the cases held that ordinarily a child under 14 is not regarded as an accomplice.[13]

There is an appellate decision you may find interesting. It was a case involving three physicians, a case, I hasten to add, where the role of each physician was confined to that of expert witness. The defendant pleaded guilty and made an application for determination of sexual psychopathy. The court appointed a panel of three experts and they gave him a 2-1 decision. The trial court reached a conclusion opposite to that of the majority of the experts and the trial court's right to go counter to the experts was upheld by the reviewing court.[14]

We will look at one more phase of the subject before concluding. What is a violation? In a prosecution against the active party it is of course no defense[15] to show the passive party consented because the act itself is a crime. It is a crime like adultery, rather than rape or battery. However, it has some resemblances to rape, for neither requires proof of emission and in both there must be some proof of penetration, no matter how slight.

The problem of proof of penetration can perhaps best be illustrated by two recent cunnilingus cases although each of these cases was based on a heterosexual incident. In one known as the Angier case[16] the court held: "The word copulation has never had the meaning of a mere contact. A mere contact, either by a licking or a kissing cannot be construed to mean a copulation." In the later, Coleman case[17] the conviction was upheld and the Angier case distinguished for the reason that in the Coleman case there was testimony that the act was continuous for a period of five to ten minutes. Logically, of course, the time element shouldn't be so important, but since these are the only reported cases in California, we should be grateful for at least this much guidance.

In concluding, I desire to point out that the courts generally try to give defendants in such cases, at least those who have no records on the particular or related sexual offenses, careful consideration. This is particularly true of the appellate courts who have stated on more than one occasion that they believe they should look very closely into the stenographic record of the trial, since the crime is an offense easily charged and difficult to defend, and because the proof is often based on testimony of accomplices, a type of testimony always to be regarded with suspicion.[18]

References:

(1) G. Legman, in his Glossary to Henry's SEX VARIANTS, Vol. II, ascribes the origination to Binkert.
(2) Dr. A. W. Herzog, "Medical Jurisprudence", p. 570
(3) Herzog, Ibid p. 565
(4) "Studies in the Psychology of Sex," Vol. on Sexual Inversion, p. 343
(5) "Studies in the Psychology of Sex," Vol. on Sexual Inversion, p. 343
(6) Ellis, Ibid, p. 350
(7) Jahrbuch fur sexuelle Zwischenstufen, April, 1913

(8) 116 Cal. 658
(9) 129 Cal. 581
(10)82 C.A. 17
(11)P.C. Sec. 290
(12)W. & I. Sec. 5500, 5502, 5512
(13)74 C.A. (2) 270 (Cf.103 Cal.508)
(14)75 C.A. (2) 907
(15)164 Cal.143 (people v. Dong Pok Yip.)
(16)44 C.A. (2) 417
(17)53 C.A. (2) 18
(18)103 Cal. 508

REGISTRATION LAW DEALT BLOW

"A sex offender who has qualified for probation and has been released from 'all penalties and disabilities' as provided by the Penal Code, cannot be tried for a public offense if he fails to register a change of address.

"So the California State District Court of Appeals held in an opinion on file in San Francisco. The opinion was written by Justice Fred B. Wood, with Presiding Justice Raymond E. Peters and Justice A. F. Bray concurring.

"The opinion, which granted a peremptory writ of prohibition, is directly opposite to findings of the Attorney General's office, which held that it is mandatory for probationers convicted of sex offenses to register under the provisions of Section 290 of the Penal Code, even after their reports have been cleared through application of provisions of Section 1203.4, Penal Code."

The above is a portion of the introduction to the decision of the appeal case successfully argued by San Francisco Attorney Kenneth C. Zwerin.

In a letter to ONE Magazine Mr. Zwerin further explains: "For some time I have been disturbed over the provisions of Section 290 of the Penal Code, which requires certain convicted sex offenders to register with a law enforcement agency each time the offender changes his residence. I have felt the section was not constitutional because it made an arbitrary distinction between sex offenders and other convicted criminals and because, at most, this section is but a law enforcement technique designed for the convenience of law enforcement agencies, through which a list of the names and addresses of certain offenders then residing in a given community is compiled and that the disclosure is merely a compilation of former convictions, publicly recorded in the jurisdiction where obtained and, in the case of California, in Sacramento as well.

"A partial clarification of this section now exists as a result of the decision of the District Court of Appeals which has determined that the registration requirement is not applicable to one who has been granted probation and subsequently had his probation terminated. In other words, the requirement of registration ended with the successful termination of the probation. The court refused to pass on the constitutionality of the section, holding that it was not necessary for its present decision.

"A great deal of credit," Mr. Zwerin continues, "should be given the San Francisco Adult Probation Officer who encouraged me to file the petition and to the individual who permitted his name to be used in the petition and was not abashed to have posterity ascertain that he had suffered a felony conviction for a sexual offense."

It should now be the duty and pleasure of every homosexual living in California who has been convicted of a sex crime which led to probation, to go to his attorney and have those technicalities performed which will release him from the onus of sex registration.