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ACLU STATEMENT ON HOMOSEXUALITY

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In recent years a good deal of public attention has been given to the question of homosexuality in our society. The pace-making Wolfenden Report in Great Britain which recently led that country to end criminal punishment of private homosexual conduct and the growing recognition of the right of privacy as a significant aspect of civil liberties, has buttressed the belief that "the right to be left alone," free of government interference or restraint, is a cherished element of man's existence. This attitude has particular application to an individual's sexual practices, where a person's most inner feelings and desires are involved.

The public debate on homosexuality has placed special focus on criminal laws penalizing homosexual conduct, chiefly the fact that they are more honored in the breach than in practice. At the same time police harassment and intimidation of homosexuals has grown to the point where homosexual organizations have properly protested both the injustice of the penal laws and society's attitudes, reflected in its law-enforcement machinery, in endeavoring to curb homosexual behavior. Fortunately both defenders and critics of homosexuality have utilized their right of free speech to enlarge public discussion of this issue, so the subject has been brought from behind a wall of silence and fear into the open air of public consideration.

An invaluable contribution to public thinking on the role of the criminal law in dealing with homosexuality was made by the American Law Institute. Its ground-breaking report, issued in 1955, urged reform in the criminal law to eliminate punishment of sexual practices performed in private between consenting adults. The reasoning of the ALI position, regrettably until now only accepted by one state, Illinois, is as illuminating today as it was in 1955:

> ".... No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This

> area of private morals is the distinctive concern of spiritual authorities. It has been so recognized in a recent report by a group of Anglican clergy, with medical and legal advisers, calling upon the British Government to re-examine its harsh sodomy law. The distinction between civil and religious responsibility in this area is reflected in the penal codes of such predominantly Catholic countries as France, Italy, Mexico and Uruguay, none of which attempt to punish private misbehavior of this sort. The Penal Codes of Denmark, Sweden and Switzerland also stay out of this area...
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> "As in the case of illicit heterosexual relations existing law is substantially unenforced and there is no prospect of real enforcement except in cases of violence, corruption of minors and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interests of blackmailers. Existence of the criminal threat probably deters some people from seeking psychiatric or other assistance for their emotional problems; certainly conviction and imprisonment are not conducive to cures. Further, there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others. Funds and personnel for police work are limited and it would appear to be poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved. Even the necessary utilization of police in cases involving minors or public solicitation raises special problems of police morale, because of the entrapment practices that enforcement seems to require and the temptation to bribery and extortion."

The American Civil Liberties Union, concerned solely with the protection of individual privacy and expressing no judgment on the wisdom or value of any kind of sexual practice, asserts that the right of privacy should extend to all private sexual conduct, heterosexual or homosexual, of consenting adults. The judgment of such conduct, including its morality, is the province of conscience and religion, but is not a matter for invoking the penal statutes of the secular state. Such statutes are most reprehensible when linked to enforcement by entrapment by special police squads or the use of "peep holes" and other devices for secret surveillance of public rest rooms.

The invasion of the right of privacy is not the only reason which dictates our opposition to such statutes. When criminal laws are not enforced either uniformly or substantially, or where such laws invite arbitrary enforcement and facilitate blackmail, the law itself is weakened by such evasion and disrespect. The existence of such laws, moreover, stimulates governmental harassment of persons who engage

in non-typical sexual behavior, even though no criminal charge is placed against them. Police, license officials, and other government administrative personnel, continually subject homosexuals to a variety of pressures, in bars, parks, night clubs, and other places where they assemble, solely on the ground that homosexuals congregate there and without any evidence of a crime being committed. Such practices are pure and simple coercion and violate freedom of assembly and equal protection of the laws. We agree with the 1960 decision of the California Supreme Court which, in reversing the Department of Alcoholic Beverage Control's revocation of the license of an Oakland bar frequented by homosexuals, said: "mere proof of patronage, without proof of the commission of illegal or immoral acts on the premises, or resort thereto for such purposes, is not sufficient to show a violation..."

Our policy stand supports only the private behavior of consenting adults. The state has a legitimate interest in controlling, by criminal sanctions, public solicitation for sexual acts, and particularly, sexual practices where a minor is concerned. The public has the right to be free from solicitation, molestation and annoyance in public facilities and places, but by the patrolling and presence of uniformed police officers rather than by secret surveillance and enticement by undercover squads. Protection against adult corruption of minors is a proper interest of the state.

A major focus of the public debate over society's treatment of homosexuals is the question of their employment by government. The present position of the U.S. Civil Service Commission is that persons concerning whom there is evidence of homosexual conduct, where there is no evidence of rehabilitation, are not suitable for any federal job.

The American Civil Liberties Union rejects this general policy as discriminatory, unfair, and illogical. It believes that private homosexual conduct, like private illicit heterosexual conduct, should not be an automatic bar to government employment.

Mr. Justice Douglas recently remarked (dissenting in Boutilier v. Immigration Service 18 L. ed 2d 661) "It is common knowledge that in this century homosexuals have risen high in our own public service - both in Congress and in the Executive Branch and have served with distinction." There have been, and undoubtedly are today, in the vast stretches of government service, men and women who perform their duties competently, and in their private hours engage in different kinds of sexual activity -- without any harmful impact on the agency that employs them. For government to deny them employment amounts to punishment for exercising their right of privacy in their own fashion. The government's fear of blackmail in this area is really the result of the government's own policy in refusing to employ homosexuals. A blackmailer could not hang over the head of a homosexual employee the threat of public exposure and loss of employment if the government did not facilitate the practice by barring homosexuals from government service. Moreover, today's more liberal sexual mores and the willingness of homosexuals to be recognized as such are lessening the possibility of blackmail. And if a homosexual employee becomes an irritating force by making sexual advances on the job which interferes with his or her performance or a fellow worker's performance, then the normal Civil Service procedures governing work performance can be invoked.

While the Union believes that homosexuals should not generally be prohibited from government employment, it agrees that conceivably in certain jobs there may be a relevancy between that job and a person's private sexual conduct, including homosexuality. But because the preservation of personal privacy is so important, the burden of proof should be placed on the government to show that a homosexual is not suited for a particular job because of the nature of that job. In such cases, the government should be restricted to evidence only of present homosexual conduct or conduct so recently in the past that it is clear that the job applicant or employee is presently practicing homosexual conduct. This is a more rational, humane approach than the present harsh and restrictive government policy which refuses to judge the individual on his skill, ability, and merit at all, but simply decides employability on the manner of expressing his or her sexual feeling.