

its authorities; the word should not be confounded with the later psychiatric notion of "homosexual," which stems from a different conceptual scheme strongly influenced by the writings of the homophile apologists Ulrichs and Kertbeny in the 1860s. However, the lay public on learning the new term then superimposed it upon the semantic field occupied by the familiar expression "sodomite," so that the afterglow of the older set of associations has never been fully dispelled.

The verb *to sodomize*, which was rare in European languages until the last third of the nineteenth century, usually has the meaning of anal penetration, whether homosexual or heterosexual. In England it is a more learned variant of the common verb *to bugger*.

Historically, the legend of the destruction of the Cities of the Plain served to tinge sodomy with the aura of a fathomless abyss of depravity, of the unspeakable, the monstrous, of "unnatural vice" that provokes the wrath of God against its perpetrators. The associations were reinforced by the sight of the barren terrain on the shores of the Dead Sea which generation after generation of pilgrims from Western Europe described in their travel accounts. As has been mentioned, the scope of the term expanded to include "unnatural" heterosexual activity and intercourse with animals—not even implied in the tale in Genesis 19 from which it derived. As a result of these manifold enhancements, the diabolical intimations of the notion came to seem perversely glamorous for a few wayward spirits.

Even now sodomy evokes from the unsophisticated a shudder of horror, though Biblical criticism long ago demolished the credibility of the composite narrative in Genesis, analyzing it as the Judaic amplification of a local myth that explained the barrenness and salinization of the shores of the Dead Sea. From the time of Justinian (reigned 527–565) onward, however, the legend was deployed as a theological and pseudo-historical justifi-

cation for laws intended to stamp out "ungodly practices" that would expose Christian society to divine retribution. Recent legislation has tended to avoid the term because of its ambiguity, its older definitions, and strongly affective character, not to mention the archaic ties with the Bible that would ill become a secular code of law.

Warren Johansson

## SOLICITATION

American law contains various provisions for the action of soliciting, or seeking to obtain by earnest request, entreaty, petition, or diligent and importunate asking, of the person of the opposite or same sex for sexual favors. The concept derives from English law.

*Basic Features.* Statutes have been employed to make arrests for solicitation to commit sexual acts in private between consenting adults which are no longer illegal in those American states that have decriminalized sodomy. This practice on the part of the police results in inconsistency vis-à-vis the consenting adult acts, violates the First Amendment, and is often supported solely by the uncorroborated testimony of a plainclothes member of the vice squad. If such solicitation contains no offer of or request for money and thus does not involve prostitution or the corruption of minors, its criminalization nowhere antedates the English act of 1898. This act punished with a maximum of two years' imprisonment any "male person who in any public place persistently solicits or importunes for immoral purposes," and thus does not specifically mean homosexual conduct. It was aimed originally at pimps and procurers, but soon became the recognized English vehicle against all forms of homosexual solicitation. A number of American jurisdictions soon adopted the concept. The provision of the old New York Criminal Code (superseded in 1965 by Section 722) was representative, punishing as a "disorderly person" anyone

"who, with intent to provoke a breach of the peace . . . frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness." The English statute had required "persistent" importuning, intending to limit its criminal sanctions to those who refused to take "no" for an answer and thereby threatened a breach of the peace, thus extending the **common law** concept that underlay the notion of "open or public lewdness," a danger because it could incite violence.

Modern legislators such as those of New York in 1965 have conveniently forgotten that the maintenance of public peace was the purpose of the older laws. They do not insist that the importuning be persistent or continued, rather they emphasize the affront and disgust experienced by the "innocent" bystanders to homosexual solicitation. They meant to protect the public from offensive behavior. Yet it is inconsistent that the *locus per se* (the place itself) converts a conversation otherwise private into a public one unless overheard by others. Rather, most men **crui-sing** for partners employ ambiguous glances, gestures, and words, often not even noticed by a disinterested heterosexual, to evoke a receptive response before unequivocally soliciting. If not encouraged, they usually desist and seek another partner. Circumspect and cautious as it usually is, homosexual solicitation subtly using innuendo and subterfuge belies the myth of flagrant homosexuals brazenly accosting defenseless and abashed respondents. Instead it is normally plainclothes decoys who entice and entrap those allegedly so open and brazen as to constitute an affront to public decency. Most convictions are secured exclusively on the arresting officer's allegation, particularly in past decades when pocket recording devices did not exist at all; complaints by private citizens are rare, indeed virtually non-existent for solicitation, in contrast with indecent exposure. Such unsavory

practices encourage shakedowns and extortion.

*Solicitation and Sexual Criminalization.* Where sodomy committed in private between consenting adults has been decriminalized, as it has been in 25 of the 50 states, solicitation to commit it should ipso facto have also been decriminalized. But this has not always been the case. In Illinois, the first state to decriminalize sodomy in 1961, arrests actually increased in the next year or so. Over 95 percent of those convicted for sex-related crimes are not convicted of sodomy or of other felonies difficult to prove such as rape, statutory rape, gross indecency, or incest, but for prostitution or lesser crimes and misdemeanors such as solicitation, public or open lewdness, battery, indecent exposure, **gross indecency** between males, and (until its limitation in recent years) loitering.

*Need for Reform.* The crime of "solicitation for sexual activity" should be stricken from the codes in its entirety. It flies in the face of modern legal thought, is inconsistent with the remainder of most penal codes, and is of doubtful constitutionality. On many occasions it has been argued that if someone who is solicited, so long as the behavior involves only consenting adults in private, is not interested in the proposal, he need only say "no" to the solicitor. In punishing solicitations to commit crimes, the law may even infringe freedom of speech. It might be a matter for the legislature to decide "whether the punishment of solicitations should be curtailed in order to protect free speech," and allow **sexual liberty**. If "a solicitation to commit a crime" constitutes "a substantial step in a course of conduct planned to culminate in" the "commission of the crime," the solicitation in those 25 states that have not decriminalized sodomy is treated as a criminal attempt and is punished accordingly. But some codes limit the "definition of crimes of attempt to those situations where the offense attempted is a crime." "An

attempt to commit a disorderly persons offense is . . . not sufficiently serious to be made the object of the penal law. Many disorderly persons offenses are too innocuous or themselves too far removed from the feared result to support an attempt offense." Codes punish solicitations to commit prostitution, but prostitution, by definition, is an offense, while private sexual activity between consenting adults is in 25 states no offense at all. Under some codes, any young man loitering on a park bench who asks a girl to go to bed with him could be sent to prison.

A number of states, including Illinois, Connecticut, Hawaii, and North Dakota, have eliminated such provisions in the course of adopting new criminal codes. New Mexico has managed to live quite comfortably without ever having had a sexual solicitation law on its statute book. These changes are the result of a growing recognition that such laws are nothing but relics of a puritanical past and serve merely to make criminals of otherwise law-abiding people without carrying out any useful social purpose. "To remove criminal sanctions from the conduct itself, yet to continue to punish solicitations to engage in the now licit conduct is not only a masterpiece of inconsistency, but provides blackmailers, extortionists, and others disposed to violence against homosexuals with a substantive vehicle for their operations."

A solicitation to commit a lewd act may be lewd or not depending on its character, not on the nature of the act solicited. Speech is not automatically rendered obscene by its subject matter. More than 30 years ago, Mr. Justice Brennan said: "Sex and obscenity are not synonymous." Neither is a solicitation automatically "fighting words" and hence a threat to public peace and order. Solicitations are thus neither automatically legal or illegal and should not be indiscriminately punished. The crime of solicitation is a relic of attempts by the state to suppress sexual activity on the part of its

citizens, attempts legitimate enough under the Old Regime, but without justification in the modern liberal state whose constitution guarantees freedom of conscience and of action to those who reject the tenets of an ascetic morality.

BIBLIOGRAPHY. Thomas E. Lodge, "There May Be Harm in Asking: Homosexual Solicitations and the Fighting Words Doctrine," *Case Western Reserve Law Review*, 30 (1980), 461-93; Arthur C. Warner, "Non-Commercial Sexual Solicitation: The Case for Judicial Invalidation," *Sexual Law Reporter*, 4 (1978), 1, 10-20.

*William A. Percy and Arthur C. Warner*

## SOLON

Poet, lawgiver, and chief archon (magistrate) of Athens in 594-93 B.C. Overpopulation had caused the exploitation of Attica's poor, who were enserved or even sold abroad into slavery for debt. Solon canceled all debts secured by land or liberty and ended serfdom but did not redistribute all land as the radicals demanded. He standardized coinage, weights and measures, extended citizenship to immigrant craftsmen, encouraged export of olive oil, and took other measures to improve the economy. He divided the citizens into four classes according to wealth, apportioning political power so that only the rich could serve as archons and *areopagitici* (councilors and judges), but also strengthened the *ecclesia* (assembly of citizens).

Having visited Crete to study its laws, Solon institutionalized pederasty in Athens. Copying the spectacularly successful reforms recently introduced to Sparta from Crete by Lycurgus to limit the increase of their hoplites (foot soldiers) so that their estates would not become overly subdivided, Solon ordained that men should marry between ages 28 and 35, in the fifth seventh of their lifespan. Setting the example himself, he copied the Cretan and Spartan system of having each aristocratic young man at about age 22,