Journal of Criminal Law and Criminology

Volume 55
Issue 4 *December*

Article 1

Winter 1964

Deviation and the Criminal Law

Donald J. Cantor

The Journal of
CRIMINAL LAW, CRIMINOLOGY, AND POLICE SCIENCE

VOL. 55 DECEMBER 1964 NO. 4

DEVIATION AND THE CRIMINAL LAW

DONALD J. CANTOR

The author is a member of the Bar of the State of Connecticut. He is engaged in the practice of law in Hartford. A graduate of Harvard College and Harvard Law School, Mr. Cantor has previously contributed articles to both the *Connecticut Bar Journal* and the *Journal of Criminal Law, Criminology and Police Science.* In September, 1962, he served as a delegate to the White House Conference on Narcotic and Drug Abuse.

In the following article, Mr. Cantor examines the question, should American criminal law prohibit the private, consensual, homosexual acts of adults? What are the nature, extent, and curability of homosexuality? What do the current state criminal statutes provide regarding homosexual acts, and how effective have they been in the areas of deterrence, prevention, and rehabilitation? Finally, is there utilitarian justification for including in the ambit of criminal law the private, homosexual acts of consenting adults? Considering these and related questions, Mr. Cantor calls for action by the organized bar, religious groups, and the medical profession to aid in enlightening the public to the need for change in laws concerning homosexuality.—EDITOR.

Variety is more than the spice of life; it is the law of life. Viewed scientifically, man may well be a single species of life, but man viewed by his fellow man is infinitely varied. And from this fact of variety derive those problems of governance, reflected in law, to which each polity is heir, regardless of its theoretical basis or its popular composition. These problems will vary in importance as the polity has matured, for with polities as with persons, no surer indication of maturity exists than the capacity to understand, appreciate, and cohabit with difference.

Of the many types of difference which exist between men, none is more basic than the sexual, and few, if any, have aroused and do arouse the same degree of emotional reaction and social and theological consideration.

This paper seeks to examine the present status of American criminal law with regard to but one deviation from our legally prescribed code of sexual behavior, i.e., indulgence in homosexual activities. More specifically, the purpose of this paper is to consider whether or not American law should be so drawn as to exclude from its ambit the private, consensual, homosexual acts of adults.

HOMOSEXUALITY[1]

Etiology

Precisely why persons seek and indulge in homosexual relations seems to be essentially unknown. Theories exist and have been advanced and refined through time. Its complexity was well captured by Oswald Schwartz when he said that homosexuality "is as intangible, elusive, indescribable as all real emotional arch-phenomena are."[2]

But despite this lack of uniformly-accepted definition, there has clearly been an evolution concerning theories of the nature of homosexual relations. Early theory dealt with homosexuality as an anomaly, either arising due to some congenital quirk or due to a form of dissipation during life. To Symonds, a minority of homosexuals were actually heterosexually disposed persons who turned to "inversion" through an excess of debauchery, which tired them of normal pleasure, while the majority were such through abnormal, inborn instincts.[3] Kraft-Ebbing considered homosexuality to be a morbid predisposition, basically though only latently congenital, which tended to be activated by onanistic practices.[4] The most romantic and probably the least credible theory was that of Ulrichs, who spoke of a female homosexual as one

[1] Homosexuality, as used herein, refers only to that state of being in both males and females which results in a desire for sexual relations with one of similar sex. The age of the actors, the frequency of desire and/or fulfillment, the co-existence of heterosexual desires, and other scientifically relevant factors are not here considered. As a matter of law, these factors are not, for the most part, deemed germane.

[2] KRICH, *Preface,* THE HOMOSEXUALS 1 (1962).

[3] Symonds, *A Problem in Modern Ethics,* reprinted in CORY, HOMOSEXUALITY, A CROSS CULTURAL APPROACH 9-10 (1956).

[4] *Id.* at 32-33.

possessed of a "male soul in a female body"[5] and who defined the phenomenon as imperfect development of the sexual organs.[6] A more recent form of the general view that homosexuality is derived from congenital abnormality suggests that the answer lies in the hormonal composition of the body, but this view has not achieved any meaningful clinical substantiation.[7]

The bulk of modern theories concerning homosexual activity may be grouped together as "psychoanalytic." This school regards homosexuality as arising out of emotional and mental conflicts encountered during childhood. As Krich points out, the resolution of the Oedipus complex is deemed crucial,[8] but precision as to causation is still lacking, even among psychoanalysts, though all seem to concur in the belief that the roots of homosexual preference lie in childhood experience. Doctor Robertiello, for example, attributes the homosexuality of one of his patients primarily to guilt feelings resulting from rivalry with a mother and sister which she sought to mask by professing a love for other women, together with a belief that women were unclean and deformed in their genital and urinary structure.[9] Dr. Bergler, an outspoken theorist in this field, has said:

> "Homosexuality is neither a biologically determined destiny, nor incomprehensible ill luck. It is an unfavorable *unconscious* solution of a conflict that faces *every* child."[10] (Emphasis in original.)

Freud, discussing a case of a female patient, traces her homosexuality partially to Oedipal trauma, but is careful to specify that factors outside this trauma had to be present and were determinative of her sexual direction.[11]

Professor Kinsey and his fellow researchers comprise a field of opinion which differs markedly from the theory adverted to above. Their feeling is that it is harder to understand why "each and every individual is not involved in every type of sexual activity" than it is to explain homosexuality.[12] They believe that the choice of erotic direction is conditioned by the effects of one's first experiences, generally accidental, and the subsequent failure of cultural pressures to alter this direction.[13] Homosexuality is, to Kinsey, a capacity inherent in humans as a biological fact of life, and not inherent merely in some humans as a congenital anomaly or present due to a failure to resolve infantile trauma.

> "The homosexual has been a significant part of human sexual activity ever since the dawn of history, primarily because it is an expression of capacities that are basic in the human animal."[14]

The layman can hardly choose between the various theories adduced, especially in light of the great dissension which exists and the great lack of definite knowledge which seems to exist.[15] To what extent, if at all, psychological maladjustment can dictate sexual direction without some form of inherent sexual propensity, or to what extent, if at all, an innate homosexual proclivity can be deflected or altered by environment, are questions for which no incontrovertible answers exist. But, despite confusion over the definitions of the etiology of homosexuality, even the layman can ascertain that homosexuality is a basic drive, a personality trait, whether it be congenital or acquired, or possibly both, and that it exists, as a rule, quite beyond the choice of those in whom it resides.

Extent

Homosexuality has been extensively practiced throughout the world and for as long as men have recorded their doings. The Old Testament stipulates:

> "Thou shalt not lie with mankind as with womankind: it is abomination."[16]

[5] Carpenter, *The Intermediate Sex*, reprinted in CORY, *op. cit. supra* note 3, at 149.

[6] Symonds, *supra* note 3, at 64, 65.

[7] Kinsey, *Criteria for a Hormonal Explanation of the Homosexual*, 1 J. CLINICAL ENDOCRINOLOGY (1941), reprinted in CORY, *op. cit. supra* note 3, at 370–83 (1956); MERCER, THEY WALK IN SHADOW 141, 143 (1959); KRICH, *op. cit. supra note* 2, at 2.

[8] *Ibid.*

[9] ROBERTIELLO, VOYAGE FROM LESBOS 250, 251 (1959).

[10] BERGLER, HOMOSEXUALITY 27 (1956).

[11] Freud, *A Case of Homosexuality in a Woman*, reprinted in KRICH, *op. cit supra* note 2, at 282.

[12] KINSEY, POMEROY, MARTIN & GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 451 (1953).

[13] *Id.* at 447.

[14] KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 666 (1948).

[15] For a lengthy list of theories *re* the causes of homosexuality, see KINSEY *et al.*, *op. cit. supra* note 12, at 447–48. Though the materials referred to relate primarily to female homosexuality, most of the theories advanced have been applied to male homosexuality as well. Reference is also made to THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, recently published in the United States by Stein and Day, where the nature of homosexuality is examined at length. See also the various sources cited throughout this article for a more detailed examination of theories concerning the nature and causes of homosexuality.

[16] Leviticus 18:22.

And in the New Testament we find charges of homosexual conduct.[17] Writers investigating and chronicling the universality of homosexual practices are not rare and clearly establish that homosexuality, however caused, has been and may be found in all places and during all eras.[18]

Despite studies and investigations, however scientifically conducted, there is no way of ascertaining how many persons participate in homosexual acts during their lives. But exactitude, though of course desirable, may well be an unnecessary luxury for our purposes, for enough is known to indicate that homosexuality is extensively practiced, and once this is known, it is doubtful whether precise figures, even if known, could or should have any effect upon the role of the criminal law in this area.

Donald Webster Cory, writing subjectively about homosexuality, refers to rather vaguely constructed estimates of the incidence of homosexuality ranging from one to ten percent of the population. But, he adds also that these estimates concern only exclusively "inverted" males and appear conservative.[19] Without defining "homosexual" precisely another source estimates one of every six American males to be homosexual.[20] Others state that one-third of all American males engage in at least one homosexual episode and that three percent of American adult males are "practicing homosexuals."[21]

The study published by Professor Kinsey and his associates is the most thorough and detailed study existent on this subject. As to the American male, Kinsey said:[22]

> "In these terms (of physical contact to the point of orgasm), the data in the present study indicate that at least 37% of the male population has some homosexual experience between the beginning of adolescence and old age. . . . This is more than one male in three of the persons that one may meet as he passes along a city street. Among the males who remain unmarried until the age of 35, almost exactly 50% have homosexual experience between the beginning of adolescence and that age. Some of these persons have but a single experience, and some of them have much more in a lifetime of experience; but all of them have at least some experience to the point of orgasm."

It is noteworthy that Kinsey takes especial pains to explain how the data supporting the percentages mentioned above were tested and retested. His study lists twelve different ways in which the said data were checked,[23] with the conclusion being that

> "There can be no question that the actual incidence of the homosexual is at least 37 and 50 percent as given above. The tests show that the actual figures may be as much as 5% higher, or still higher."[24]

The percentages contained in the report on the female showed interesting differences. Whereas the American white male shows an incidence rate of 37%, the rate of contact to the point of orgasm among females was 13%, and whereas homosexual responses were noted in 50% of the males, the figure was 28% in the females.[25]

In both studies, Kinsey refers to and cites other estimates of the incidence of homosexuality, some lower, some higher than those of his research. In every case known to this writer where an estimate has been made, the result is that homosexuals are thought to exist in very large numbers. True, the percentage arrived at may be only one or two percent of the population, but when this is translated into numbers of persons, it reaches the millions. Thus, whether one accepts Kinsey's figures, modifies them, or rejects them, the fact still seems to be that when one speaks of homosexuals, one speaks of one of America's (and the world's) large minority groups.

Curability

Can a homosexual be "cured"? This is a question which could be posed only by one who believed that homosexuality was in the nature of a disease. If homosexuality be, in truth, a capacity to respond to a particular form of stimulus which is native to humans qua humans, then the question of "cure" becomes moot. But if, as the psychoanalytic theorists maintain, homosexuality is a

[17] Romans 1:26, 1:27.

[18] Westermarck, *Homosexual Love*, reprinted in CORY, *op. cit. supra* note 3, at 101–27 (1956); MERCER, THEY WALK IN SHADOW 25–34 (1959); Licht, *Male Homosexuality in Ancient Greece*, reprinted in Cory, *op. cit. supra* 267–348; KINSEY et al., *op. cit. supra* note 12, at 451–52; LEWISOHN, A HISTORY OF SEXUAL CUSTOMS 337–46 (1958); WESTWOOD, A MINORITY 62–65 (1960).

[19] CORY, THE HOMOSEXUAL IN AMERICA 90 (1951).

[20] STEARN, THE SIXTH MAN 16 (1961), quoting an officer of the Mattachine Society.

[21] CAPRIO & BRENNER, SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS 102 (1961).

[22] Kinsey *et al*, *op. cit. supra* note 14, at 623.

[23] *Id.* at 626.

[24] *Ibid.*

[25] Kinsey *et al.*, *op. cit. supra* note 12, at 474–75.

disease traceable to infantile trauma, then the question of "cure" becomes germane.

Doctor Robertiello, in his work about the psychoanalysis of a female homosexual, claims that his treatment resulted in cure. He does, however, perhaps inadvertently, qualify his claims by adding at the end:

> "Up to the point of publication—about two years after the last reported session—Connie has never once returned to homosexual activity."[26]

Thus, the one fact which really seems to exist relative to Connie's "cure" is that she has, to the best of her psychiatrist's knowledge only, not actually reindulged in homosexual activity for about two years. Despite the doctor's claims, this history falls far short of proof that homosexuality may be cured.

Analysts themselves dispute the curability of homosexuality. This is openly admitted by Bergler, who himself believed that cures are possible.[27] But of striking importance are the essential prerequisites of successful treatment laid down by Dr. Bergler:

> "On the basis of the experience thus gathered, I make the positive statement that homosexuality has an excellent prognosis in psychiatric-psychoanalytic treatment of one to two years' duration, with a minimum of three appointments each week—*provided the patient really wishes to change.*"[28] (Emphasis in original.)

Even, therefore, if curability be judged on terms supplied by one of its most outspoken champions, it is clear that the homosexual must desire to be cured, must have the time and means to afford it, and must be fortunate enough to choose a psychoanalyst capable of treating homosexuality, for, as we have seen, not all psychoanalysts believe that homosexuality is curable.

Other obstacles also exist. It is conceded by Dr. Robertiello that his patient was under analysis in excess of four years, though she had not been regular in her appointments.[29] Costs of analysis being what they are, how many persons could afford a minimum of 156 appointments for the treatment of a condition that may not, after all, actually be curable permanently? And what of the treatment itself; if a homosexual is to be treated, he (or she) must be brought to a point where he desires and can satisfactorily perform heterosexual coitus. Realization by the patient of the supposed causes of his homosexuality cannot be assumed to effect cure; effects must be gauged before treatment can be evaluated and, a fortiori, terminated. Consequently, it seems inescapable that effective treatment for homosexuality—assuming such can occur—must presuppose heterosexual relations during its course. In the vast majority of cases, moreover, by the very nature of the condition, this intercourse must be illegal, as the patients will seldom be married. Dr. Robertiello's Connie, for example, had several unlawful heterosexual contacts prior to her discharge.[30]

This is not mentioned for the purpose of passing a moral judgment on unlawful heterosexual contacts either in the course of treatment for homosexuality or otherwise, but it is important when one considers whether or not some method of enforced therapy is a desirable addition to the criminal law as it affects homosexuals.

A cure for homosexuality, therefore, again assuming without conceding its possibility, is certainly expensive, if not prohibitively so, is certainly a lengthy process, presupposes the desire for cure by the patient, and seems to require the patient to violate the laws of heterosexual conduct if treatment is to have a chance for success. With conditions such as these, obviously only a few persons could be expected to qualify.

Acts

Some examination of the various acts performed by persons indulging in homosexuality is necessary as prologue to an examination of the laws which apply to such acts. Without attempting to estimate relative frequencies of use and eliminating all forms of sexuality known broadly as "petting," it may be said that homosexual persons will generally seek to achieve orgasm in one or more of the following ways:

1) Oral-genital contact (applicable to both males and females);
2) Anal intercourse (only male to male);
3) Mutual masturbation of one by another (applicable to males and females);
4) Interfemural or analogous means of simulating vaginal intercourse (male to male usually;

[26] ROBERTIELLO, VOYAGE FROM LESBOS 253 (1959).
[27] BERGLER, HOMOSEXUALITY 195 (1962).
[28] *Id.* at 176. On the unlikelihood of homosexuals wanting to change, see CORY, THE HOMOSEXUAL IN AMERICA 187 (1951).
[29] ROBERTIELLO, VOYAGE FROM LESBOS 238 (1959).
[30] *Id.* at 243, 244.

may be female to female where penis substitutes are utilized).

Such acts as are outlined above are generally unlawful in the United States. In most cases, commission thereof makes the actors guilty of a felony.

THE LAW[31]

Statutes and Penalties

Sodomy was defined by common law as the anal penetration of a man by a man. Sexual connection between man and beast, now incorporated as a rule in the same statutes which regulate conduct between persons, was called "bestiality."[32] For the most part, however, present American statutes defining the crime of sodomy have enlarged its ambit so as to include most acts of sexual connection with the exception of vaginal intercourse.

Homosexuality, in and of itself, is not unlawful in any jurisdiction. Any attempt to make it so would clearly seem unconstitutional.[33] But the acts of homosexuals in seeking orgasm are unlawful and fall, for the most part, under the "sodomy" statutes.[34]

In every state, the statutes prohibit anal intercourse; in Illinois, it is not unlawful unless force is involved. In 23 states, the language makes it plain that the practice of fellatio is unlawful.[35] There seems little doubt that in the states where the statutes are not explicit as to fellation, the general proscriptive language would be held to include fellatio within its terms.[36] It has been held that penetration by the male member into any orifice of the human body other than the female vagina constitutes the crime against nature.[37] Some statutes have accomplished this by expressly defining the crime of sodomy as "carnal copulation with a beast, *or in any opening of the body; except sexual parts*, with another human being."[38] (Emphasis added.) In practically every state, the wording of the statutes is so vague and sweeping that any sexual practice save male-female vaginal intercourse could fit nicely under its interdictions.

The statutes generally apply to "whoever," "any person," "every person," etc., and consequently would seem to apply equally to female homosexuality and male homosexuality. In some states, however, the wording of the statutes restricts its pertinence to male homosexuality,[39] and in those states where heterosexual cunnilingus has been held not to constitute "the crime against nature," presumably neither would homosexual cunnilingus.[40]

Since the sodomy statutes generally refer to acts involving some form of sexual penetration, they do not usually cover masturbation mutually effected or effected by one partner for the other. However, two states label as sodomy the enticing, etc., of one under 21 to commit masturbation, without specifying that masturbation has to be by the minor of himself,[41] and Texas also has language in reference to minors which would seem to make mutual masturbation or masturbation of the actor by a minor sodomy.[42]

The sodomy statutes condemn the proscribed acts as felonies and consequently provide for stringent maximum penalties. In seven states, it is possible to be sentenced to life imprisonment for committing an act of homosexual penetration.[43]

---

[31] The "law" which this paper deals with includes only those statutes which, by their express terms, are meant to apply to homosexual acts intended to result in orgasm. Those laws prefaced "lewd," "lascivious," or "indecent," etc., are admittedly used for prosecutions in this area, but usually because of a sympathetic prosecutor or a deal with defense counsel. They are not intended to outlaw these acts and are not, consequently, society's expressed legal view of these acts.

[32] 48 AM. JUR. 549–50.

[33] Robinson v. California, 370 U.S. 660 (1962). This case held unconstitutional, under the cruel and unusual punishment provisions of the Fourteenth Amendment, a California statute which made the state of addiction to narcotics unlawful without proof of the commission of unlawful acts.

[34] Other names used: Crime Against Nature, Unnatural Crimes, Unnatural or Perverted Sexual Practices, Unnatural and Lascivious Acts, Buggery.

[35] New York, Alaska, Colorado, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Iowa, and Illinois (force required). See Appendix for citations to current state statutes.

[36] State v. Attwater, 29 Idaho 107, 108, 157 Pac. 256 (1916); Glover v. State, 179 Ind. 459, 101 N.E. 629 (1913); Comer v. State, 94 S.E. 314 (1917); Territory v. Wilson, 26 Hawaii 360, 362 (1922); State v. Stant, 65 Ore. 178, 132 Pac. 512 (1913); State v. Cyr, 135 Me. 513, 514, 198 Atl. 743 (1937); *Ex parte* DeFord, 168 Pac. 58, 60 (1917); Furstonburg v. State, 148 Texas Crim. 638, 190 S.W.2d 362, 363 (1945).

[37] State v. Stant, 65 Ore. 178, 132 Pac. 512 (1913).

[38] OHIO REV. CODE ANN. §2905.44 (Baldwin 1958). See also NEB. REV. STAT. §28–919 (1956); IOWA CODE §705.1 (1962).

[39] Connecticut, Georgia, Kentucky and South Carolina. Kinsey's researchers also excepted Wisconsin, but WIS. STAT. §944.17 (1959) seems to cover cunnilingus.

[40] KINSEY *et al.*, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 484 n.36 (1953).

[41] IND. STAT. ANN. §10–4221 (1956); WYO. STAT. §6–98 (1957).

[42] TEX. PENAL CODE, art. 524 (1948).

[43] Missouri, Montana, Nevada, New Mexico, Idaho,

In 13 states, the maximum penalties are less than life but at least 20 years imprisonment.[44] In 22 states, the maximum penalties are between ten and 15 years imprisonment.[45] Of the eight states remaining, six have maximum penalties of five years.[46] One of these six, South Carolina, provides for a five year penalty upon conviction as a mandatory period of imprisonment. Thus, though South Carolina has one of the lesser maximum sentences, in practice its law is one of the most stringent. Delaware and Virginia have the lowest maximum penalties, i.e., three years, with a one year minimum in Virginia. None of these statutes, except New York and Illinois, varies punishment with the presence or absence of force or fraud.

Manifested Attitudes

The purpose of a criminal statute is to set forth with all possible precision those acts or omissions which the statute prohibits or commands, and to state what the penalty shall be for failure to comply. Where statutes go beyond this, and contain language which does not serve to define the crime but rather to describe it in moral terms one may justifiably pause to wonder why.

In 14 states, the offenses contained in the sodomy statutes are referred to as "abominable" and in most instances as both "abominable" and "detestable."[47] In seven states, the offenses are termed "infamous."[48] In all of these 21 states, save only South Carolina, the offenses are further described as being a "crime against nature." In ten other states, the adjectives "infamous," "abominable," and "detestable" are omitted, but the phrases "crime against nature" or "against the order of nature" are utilized.[49] In three states, the statutes employ such adjectives as "unnatural," "abnormal," and "perverted" to characterize the prohibited acts.[50] Only 16 of our 50 states are possessed of statutes which simply define the offense and state the penalty therefor. Not even the crime of premeditated murder is described by adjectives of censure; neither are other sexual crimes such as fornication, adultery, or rape. In fact, no other crimes are so described.

This singular attitude of moral censure is also evidenced by case reports. In an Ohio case which did not directly concern charges of homosexual acts, the court nonetheless referred in dicta to sexual relations between mature males as "sexual perversion" and "unnatural commerce" and referred to those who indulged therein as "human degenerates" and "sexual perverts." The particular defendant was called "slimy," "bestial," and "lascivious."[51] In North Carolina, the court defined the scope of the state sodomy statute thusly:

> "Our statute . . . is broad enough to include . . . all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified."[52]

Other cases which dealt with sodomy prosecutions—not necessarily homosexual in nature—have caused such revulsion in the appellate courts that they have refrained from reciting the facts, calling the details either "nauseating"[53] or "revolting."[54]

Perhaps the most indicative judicial language

California, and New York. In New York, however, this penalty may apply only where sodomy in the first degree occurs, i.e., where the act is imposed by force, threat of force, or where the partner is not aware of what is transpiring. Where an act is consensual, but the partner is a minor, New York has sodomy in the second degree, which covers a maximum penalty of ten years. Where "a person . . . carnally knows any male or female person by the anus or by or with the mouth under circumstances not amounting to sodomy in the first degree or sodomy in the second degree," he is guilty of a misdemeanor. N.Y. PENAL LAW §690. A misdemeanor without specific penalty is punishable under section 1937 with one year, $500.00 fine, or both.

[44] Ohio (20), Minnesota (20), Nebraska (20), New Jersey (20), North Carolina (60), Hawaii (20 plus $1,000 fine), Arkansas (21), Arizona (20), Massachusetts (20), Rhode Island (20 with a minimum of 7), Utah (20), Connecticut (30), and Florida (20).

[45] Texas (15), Wyoming (10), Indiana (14), Mississippi (10), North Dakota (10), Alaska (10), Colorado (14), Maryland (10), Tennessee (15, minimum of 5), Washington (10), West Virginia (10), Iowa (10), Illinois (14), Oregon (15), Pennsylvania (10), South Dakota (10), Georgia (10), and Alabama (10). Illinois does not prohibit acts which are consensual between adults. See note 93, *infra*.

[46] New Hampshire, Louisiana, Vermont, Kentucky, South Carolina, and Wisconsin.

[47] Indiana, South Carolina, Utah, South Dakota, Rhode Island, Oklahoma, Michigan, Kansas, Massachusetts, North Carolina, Wyoming, Missouri, Mississippi, and Florida.

[48] Arizona, California, Colorado, Idaho, Nevada, New Jersey, and Montana.

[49] Alabama, Hawaii, Alaska, Georgia, Connecticut, Maine, Oregon, Tennessee, Louisiana, and Delaware.

[50] Maryland (unnatural and perverted); Wisconsin (abnormal); and New Hampshire (unnatural).

[51] Barnett v. State, 104 Ohio St. 298, 135 N.E. 647, 649 (1922).

[52] State v. Griffin 175 N.C. 767, 94 S.E. 678, 679 (1917).

[53] People v. Ramos, 125 Cal. App. 2d 383, 270 P.2d 540 (1954).

[54] Luevanos v. State, 157 Tex. Crim. 623, 252 S.W.2d 119 (1952).

was that of the Maine Supreme Court when it said:

> "The statute [sodomy] gives no definition of the crime but with due regard to the sentiments of decent humanity treats it as one not fit to be named, leaving the record undefiled by the details of different acts which may constitute the perversion."[55]

Even the texts editorialize with regard to sodomy. In discussing the requisites for indictments alleging sodomy, *American Jurisprudence* explains that courts have relaxed some of the strict rules of pleading "because of its [the crime of sodomy] vile and degrading nature."[56]

Comparative Penalties

As part of our effort to present the current law relating to the crime of sodomy, in particular homosexual acts included therein, it is helpful to contrast and compare the statutory penalties for sodomy with other crimes. This is in order to view these penalties in perspective, to place them properly in their social context so that, as a matter of social policy, they may be evaluated.

Since homosexual sodomy is a sexual offense which does not require force, fraud, or duress for its commission, and since it is a felony which requires sexual connection, the logical crime for comparison is adultery. Before examining the penalties, it should be noted that the crime of adultery seems a far greater threat to domestic tranquillity than does homosexual sodomy. It is also true that adultery poses the problems of bastardy and spurious issue which, quite obviously, do not exist with homosexual sodomy.

Nonetheless, a survey of the 50 states with regard to the crime of adultery shows without question that homosexual sodomy is viewed as a far more serious offense. Whereas some form of homosexual connection is criminal in every state, adultery is not a crime in five states.[57] Whereas incarceration is possible for consensual, adult homosexual connection in every state but Illinois, only fines may be levied for a conviction for adultery in six states, making a total of 11 states in which one committing adultery cannot be incarcerated.[58] Forty-one states punish consensual, adult homosexual sodomy with maximum penalties in excess of five years; in no state does the maximum penalty for adultery exceed five years. In fact, only five states have maximum penalties for adultery equal to five years.[59] Whereas the maximum penalties for adult, consensual homosexual sodomy exceed three years' imprisonment in 46 states, in only six states can adultery be punished by more than three years.[60] Vermont is the only state wherein the maximum penalty for adultery equals the maximum penalty for homosexual acts. In every other state, the homosexual may be more severely punished than the adulterer, and in most cases the difference is that of a serious felony compared to a common misdemeanor.

Heterosexual and Masturbatory Offenses

Evaluation of the sodomy statutes governing homosexual connection may be aided by briefly considering the other offenses these statutes proscribe. Though such other offenses bear no direct relation to homosexuality, nonetheless, being incorporated within the same general statutes, they indicate the thinking which predominates in the whole field of sexual deviation.

Heterosexual contacts other than vaginal intercourse are major felonies. The same penalties apply as are prescribed for homosexual connections. Heterosexual fellatio is the crime of sodomy; cunnilingus may or may not be depending upon local interpretation. But many statutes, of more modern origin, are sufficiently definite as to include it. As pointed out above, a few statutes also pertain to masturbation. Moreover, there is authority for the proposition that a husband and wife may, in private, without the element of force or duress, commit the "crime against nature."[61] No state statute has language specifically limiting its application to unmarried persons.

In many of our states conviction of various crimes identifies the defendant as a potential sexual psychopath and the said defendant must thereupon be examined psychiatrically prior to

[55] State v. Cyr, 135 Me. 513, 198 Atl. 743 (1938).

[56] 48 AM. JUR. 551.

[57] Kansas, Louisiana, Nevada, New Mexico, and Tennessee.

[58] Arkansas ($100 max.), Kentucky ($50 max.), Maryland ($10 max.), Texas ($1,000 max.), Virginia ($100 max.), West Virginia ($20 max.), and, of course, those states listed in note 57.

[59] Connecticut, Maine, Oklahoma, South Dakota, and Vermont.

[60] The states listed in note 59 *supra* plus Michigan (4 years). North Carolina provides for a discretionary sentence for adultery, but deems same to be a misdemeanor. Consequently it is supposed that penalties for adultery in North Carolina would seldom, if ever, exceed one year.

[61] Hanselman v. People, 168 Ill. 172, 48 N.E. 304 (1897).

sentencing.[62] Conviction of heterosexual sodomy in any form is one of the crimes conviction for which invokes these sexual psychopath provisions. This is so despite Kinsey's findings as to the incidence of fellatio and cunnilingus[63] and despite the fact that oral-genital activity is often recommended by authorities on marriage.[64]

The Efficacy of the Law

Before considering the propriety of the various statutes described above, it seems logical first to appraise their efficacy; for the efficacy of a law is one factor which bears upon its propriety.

It is generally agreed by modern criminologists and social thinkers that a criminal law may be enacted for any one, or possibly a mixture of three purposes, i.e., to deter future offenses of the same nature by other persons by punishing the particular defendant, to prevent repetition of offenses by the particular defendant by removing him from society, and to rehabilitate the particular defendant by making his incarceration in some manner therapeutic.[65]

Deterrence

Have the laws against homosexual sodomy effectively deterred an appreciable number of persons from committing the acts proscribed thereby? Can they do so in the future?

The ultimate answer, of course, is nobody knows. But several factors indicate that the answers to both questions are probably negative. In the first place, and, however incomprehensible this may be to many exclusive heterosexuals, homosexual love is a manifestation of the love need and the sexual drive. In its purest sense, it is not, though like heterosexual "love" it may sometimes take the form of a casual dalliance, a wholly optional experience. Those who speak of homosexual love and its drives make it very clear that the force of the phenomenon is no less demanding than is heterosexual love.[66] This is obvious, upon reflection, when one considers the fact that homosexuality has existed in all areas at all times despite the harsh penalties meted out for homosexual acts.[67] And certainly it is true that the present penalties are harsh enough to be an effective deterrent if, indeed, effective deterrence is possible. Though it cannot be conclusively shown that more homosexual activity would not occur were such not criminal, nonetheless the various theories concerning the nature of homosexuality, together with the high incidence estimates, seem to indicate that very little activity, if any, is deterred by threats of punishment. Moreover, the very intensely personal nature of such activity implies that the drives must be also intense and even compulsive, thus not deterrible by the remote, though severe, legal threat. To the extent that some may dabble casually in such activity, the law may have a deterrent capacity, since the desire is, by definition, not a drive but a curiosity. However, surely a small proportion of homosexual activity is attributable to such motivations, and who is to say that such curiosity is not more attracted than deterred by the unlawful nature of the activity?[68]

As a matter of basic fairness, the burden of showing the law's capacity to effect deterrence should be placed upon those who would maintain such restrictions upon individual freedom of choice and who would inflict severe penalties upon offenders. To this author's knowledge, no such claim has ever been competently put forth, though one reputable critic has criticized Kinsey for *not* showing that the law has not deterred homosexual activity.[69]

[62] See 29 Temp. L.Q. 273 (1956) for a full discussion of these sexual psychopath laws.

[63] Kinsey *et al.*, Sexual Behavior in the Human Female 257–59 (1953).

[64] Haire, Encyclopedia of Sexual Knowledge 189, 190 (1937). This work also cites Van DeVelde's Ideal Marriage as a supporting view. See, too, Caprio & Brenner, Sexual Behavior: Psycho-Legal Aspects, 68, 69 (1961). One source estimates that 30 to 40 per cent of Americans perform mouth to genital practices. See Abrahamson, Who Are the Guilty? 299 (1952).

[65] There is a school which believes that punishment may be proper as a form of social retribution or revenge. The writer feels that this is a discredited theory, bordering on the barbaric and unworthy of consideration. Moreover, in a later section, we take up the matter of the criminal law as an enforcer of morality, and this discussion covers the theory of social revenge which, basically, favors the utilization of criminal statutes for the purpose of mollifying moral outrage. For a very learned discussion of retribution as a basis for law, see Michael & Wechsler, Criminal Law and Its Administration 6–11 (1940).

[66] See Vidal, The City and the Pillar (1948). This is a novel, but fiction is perhaps the best medium for realistically portraying emotions.

[67] See note 18 *supra*. Sodomy was a felony punishable by death at common law. 58 C.J. 788.

[68] Bergler, who believes homosexuality to be curable, calls threats of imprisonment "futile" and suggests that homosexuals have "unconscious masochistic tendencies" which makes imprisonment "alluring." Bergler, Homosexuality 28 (1962).

[69] Schwartz, 96 U. Pa. L. Rev. 914, 915–17 (1956).

Prevention

The field of homosexual conduct admits of few facts. But one conclusion does seem to warrant the title of "fact," and that is that the law cannot serve a preventive function with respect to homosexual conduct. The reason is far from subtle—you cannot prevent homosexual activities by insuring that homosexuals will be incarcerated with persons of the same sex. As a matter of common logic, incarceration will promote rather than discourage such conduct; for not only are persons of similar sex forced to live together for extended periods, but they also are denied any opportunity for heterosexual experience.[70] Such punishment has the triple effect of encouraging homosexual activity between prisoners, heightening the probability of increased homosexual activity upon release from confinement, and causing unrest, discipline problems, fights, and even killings between inmates battling over partners, resisting advances, or having lovers' quarrels. Would we attempt to stop fornication by instituting heterosexual incarceration?

Rehabilitation

That the law cannot perform a rehabilitative function with regard to persons convicted of homosexual offenses also hardly seems debatable. Assuming arguendo the curability of homosexuality, it still remains true that only a small percentage of persons can qualify as curable according to the most optimistic observers.[71] And in order to qualify one must, at very least, have consistent, personalized psychiatric attention. Our prisons do not and cannot provide enough of this attention to effect an important number of cures—again, one need hardly point out that placing one with homosexual drives—whether or not the person is oriented bisexually—in a society composed solely of persons of similar sex is not likely to lead to heterosexual rehabilitation.

[70] See DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 164 (1962), wherein a portion of a letter from an inmate in the Connecticut State Prison describes his sexual desperation and the tendency of inmates to "satisfy . . . desires (sexual) with the only thing available," i.e., other men. See also CAPRIO & BRENNER, SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS 150–55 (1961).

[71] See the discussion *supra* as to the question of homosexuality and its curability.

SHOULD ADULT, CONSENSUAL HOMOSEXUAL ACTS BE UNLAWFUL?

The Utilitarian Arguments

Since it appears that homosexuality is universal, widespread, deeply motivated, and essentially not curable under present conditions, and since it also appears that adult, consensual, homosexual acts are severely condemned and harshly punished, and also that the law is incapable of materially stopping their practice, one must inevitably question why our laws provide as they do. What is there about the practice of homosexual acts that creates this animosity and occasions these laws? How do homosexual acts threaten society?

In preface, let it be clear that the homosexual acts to be discussed are only those committed by consenting adults in private. There is no question about the propriety of making criminal any type of sexual act which is imposed by one person upon another through fraud or force, nor is it disputed that sexual acts should, by their nature, be private and not introduced by adults to minors.[72] By so defining the scope of the above inquiry, we have rendered immaterial the various attacks on homosexual practices based on their being corruptive of youth, a type of assault, and a type of public nuisance.

No one known to this writer has ever claimed that the various acts involved in homosexual congress are physically harmful. Even those who believe that homosexuality ranks as a disease would recognize that any debilitative psychological effects thereof derive from the fact that the desire exists and not from the fulfillment of that desire through specific acts. Consequently, if the commission of homosexual acts has socially deleterious effects, it must be in relation to persons other than the actors themselves or against society in general.

Persons indulging in homosexual acts, to the extent that this defines their sexual activity, do not reproduce. This is readily conceded. But it is not a crime to fail to reproduce or utterly to eschew attempting to do so. Surely no one would urge that abstinence be deemed a felony. By what reasoning, therefore, can this aspect of homosexuality justify labeling acts thereof as criminal?[73]

[72] The precise age to be used for "adults" is not a point to be considered here, nor is the question of what is the proper crime and punishment to be applied to homosexual acts not in private, with minors, or induced through fraud or force.

[73] For a fuller discussion of this point, see CORY, THE HOMOSEXUAL IN AMERICA 33–34 (1951). Cory also ad-

It has been argued that society loses the use of men (and women presumably) who succumb to homosexual acts because these acts make them nervous, secretive, and undependable. The answer to this was well phrased by the Moral Welfare Council of the Church of England when it opined:

> "In reality, however, these defects of character are due not to homosexual practices, but to the fears of punishment or of blackmail engendered by the law."[74]

The Council would have made a finer commentary had it pointed out that many aspects of modern life cause men to be nervous, secretive, and undependable, but this provides no basis for criminality. Moreover, assuming arguendo that these characteristics do exist in homosexuals or some of them, surely it is the fact that one has homosexual desires which is the root cause of these characteristics and not the fact that these desires are satisfied. Repressed desires occasion more nervousness than fulfilled ones.

Other arguments which have been advanced are: (1) that homosexual behavior menaces the health of society; (2) that homosexual behavior has a deleterious effect on family life; and (3) that men who indulge in homosexual behavior may turn eventually to minor males.

Point "1," in its fully developed form, is a theory of history which maintains that homosexual behavior causes demoralization and the decay of civilization. It is, of course, a gross and clearly irrational distortion of history, of which the Wolfenden Report said simply: "We have found no evidence to support this view."[75]

Point "2", as stated in the Wolfenden Report, is probably true.[76] Homosexual acts by either partner would obviously tend to jeopardize a marriage, even when the betrayed mate was able to view such conduct dispassionately and without moral revulsion,[77] because they would signify a love or sex object other than the legal mate. But if this provides a sound reason of social utility for punitive laws, logic requires that any such law be restricted to married persons who philander homosexually and to those who philander with married persons, and that the law be no more severe than the adultery and fornication laws which apply to married persons. That none of these requirements is met by contemporary American law illustrates that the preservation of marriage is not even a contributing reason for existing statutes. This argument is no more than a debater's point very transparently advanced by persons who favor present law for wholly different reasons.

Point "3" is no more persuasive. Legalization of consensual acts in private by adults would leave the acts of pedophiliacs as criminal as they presently are. Moreover, the Wolfenden Report states that information received from the Netherlands police indicates that legalization of consensual adult acts has tended to deflect some persons away from minors and towards adults. This is quite simply because relations with the latter are legal and with the former illegal.[78]

The Wolfenden Report considers another argument for the criminal outlawing of homosexual acts. This argument is that to make homosexual acts lawful, even with restrictions, must "suggest to the average citizen a degree of toleration by the Legislature of homosexual behavior and that such a change would 'open the flood gates' and result in unbridled license."[79]

This argument treats as irrelevant the superior question of whether or not there is a valid social reason in the first instance to make homosexual acts unlawful, and it also suggests no reasons why an increase thereof would itself be harmful. Moreover, such a view rests on the assumption that the present punitive laws are a great dam holding back a reservoir of potential homosexual acts which will inundate society if the dam is punctured. There might be some point to this assumption if homosexual acts were to any important measure casual, but very clearly they are not. Persons so believing greatly exaggerate the effect of these laws as a deterrent and just as greatly misunderstand

---

vances the argument that today, in many areas at least, birth control is the population need, not added procreation.

[74] DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW, 143 (1962). Reprinted from *Interim Report, The Problem of Homosexuality* by a group of Anglican clergy and doctors.

[75] REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION PRESENTED TO PARLIAMENT BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT AND THE SECRETARY OF STATE FOR SCOTLAND BY COMMAND OF HER MAJESTY, Sept. 1957. (Cmmd. 247) (The Wolfenden Report). Reprinted in part in DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 192 (1962).

[76] *Id.* at 192-93.

[77] Homosexual conduct has been held to be such cruelty as to warrant divorce. H.V.H., 59 N.J. Super. 227, 236-37, 157 A.2d 721, 726-27 (1959).

[78] THE WOLFENDEN REPORT, reprinted in part in DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 193 (1962).

[79] *Ibid.*

the nature of the urges which produce homosexual acts. Once again, to quote the Wolfenden Report:

> "It is highly improbable that the man to whom homosexual behavior is repugnant would find it any less repugnant because the law permitted it in certain circumstances."[80]

The sad fact seems to be that punitive laws in this area, rather than serving a socially utilitarian end, have the opposite effect. The Moral Welfare Council of The Church of England has reported that present laws have caused charged men to commit suicide and that they have created an opportunity for blackmail by unscrupulous persons, especially male prostitutes. The Council further suggests that older homosexual men have seduced boys out of fear of being blackmailed by older male partners, with the ironic result that the law endangers the very young it purports to protect. The Council speaks of the practice of using police "agents provocateurs" to catch offenders, with the correlative danger of police corruption, and it further mentions the fact that present laws create in homosexuals "an aggrieved and self-conscious minority which becomes the centre for dissatisfaction and ferment." No one can gauge the true extent to which such a "sense of persecution" can affect individuals and society adversely,[81] but that such a sense of persecution has deleterious effects is nonetheless a fact.

Yet other socially harmful aspects of present law exist. These laws are ineffectual to reduce the incidence of homosexual acts appreciably, and they are enforced inequitably. They are, for example, hardly ever enforced against females committing homosexual acts,[82] and they generally affect only the poor and desperate who publicly seek mates. A law which, like the Volstead Act, cannot be effective simply brings disrepute to law itself, and where it cannot be enforced, as where private, adult, consensual acts are involved, it becomes ridiculous.[83]

Morality and the Sodomy Laws

When one considers the lack of socially harmful results occasioned by the consensual, adult homosexual act and, at the same time, bears in mind the severe penalties provided therefor and the great sense of revulsion which greets such acts by laymen, judges, and legislators alike, one realizes that the statutes involved embody moral precepts. Consequently, the proscribed acts are condemned not because they have socially harmful effects by objective measurement, but because the acts are deemed wrong and sinful as a matter of theology.[84] Grasp of this simple truth equips one to understand the severity of the applicable statutes as well as the emotional language of decisions and observers.

Whether or not it can ever be proper for the criminal law to embody moral ideas for their own sake is not our question. Whether or not it is proper for the American criminal law to do so is precisely the question. And this question must be answered with a definite "no." It must be so because the preservation of the liberty and freedom of choice of its citizens is the primary role of the American polity. One aspect of the American message is that freedom may be circumscribed only where the interests of society so require, where the freedom of one will or may work to the injury of others. Even here, we circumscribe reluctantly and only when the injury appears sufficiently immediate and grave. In this, we are the embodiment of the theories of John Stuart Mill.[85] Where freedom is restricted and no social good is thereby advanced, the result is tyranny. For tyranny consists of the imposition of rules of conduct, and it exists wherever one man's or one group's moral ideas are forced upon the whole society. That the ideas may be held by a majority, however numerous, does not make the result less tyrannical. Critics may argue that this brief summary of the sense of American law and the sense of America itself is subject to a thousand exceptions. But this matters little, for it is against

[80] *Id.* at 194.

[81] Group of Anglican Clergy and Doctors, *Interim Report, The Problem of Homosexuality*, reprinted in part in DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 142–43 (1962).

[82] KINSEY *et al.*, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 484 (1953).

[83] See Letter from Rev. John R. Connery, S.J., Professor of Moral Theology to Joseph Goldstein, reprinted in part in DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 140 (1962).

[84] Many sources exist which deal with the attitudes of our predominant religions towards homosexual acts. See, for example, KINSEY, *et al.*, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 481–83 (1953). As is illustrated by notes 16 and 17, acts of homosexuality were condemned in both New and Old Testaments. See also further references to biblical attitudes in KINSEY *et al.*, *supra*.

[85] "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others." JOHN STUART MILL, ON LIBERTY, ch. 1.

the ideal that practice must be measured. And, in measuring the liberty of our American citizen to choose his mode of sexual release, America is found wanting. For here our statutes enforce a religious tenet in prohibiting homosexual acts,[86] and they do so without, at the same time, serving a utilitarian end.

It is pleasing to note that more and more voices are being raised against governmental imposition of morals in this area. The Wolfenden Report stated its conclusion thusly:

> "We accordingly recommend that homosexual behavior between consenting adults in private should no longer be a criminal offense."[87]

Although homosexual acts are still sinful in Catholic theory, yet there are Catholic clerics who have taken the position that sin is private, between man and God, not man and government. The seven Catholic clergymen and laymen who submitted a report to the Wolfenden Committee stated, inter alia:

> "It is not the business of the state to intervene in the purely private sphere but to act solely as the defender of the common good. Morally evil things, so far as they do not affect the common good, are not the concern of the human legislator.
>
> "Sin, as such, is not the concern of the State but affects the relations between the soul and God.
>
> "Attempts by the State to enlarge its authority and invade the individual conscience, however high minded, always fail and frequently do positive harm."[88]

The British Roman Catholic Advisory Committee on Prostitution and Homosexual Offences and the Existing Law recommended that "the criminal law be amended so as to exclude consensual acts done in private by adult males."[89] Other eloquent voices have been raised in England, including that of Professor H. A. A. Hart,[90] urging that the enforcement of morals as morals is not properly a governmental function.

Fortunately, men of stature in this country are also becoming heard. Judge Murtagh has already been mentioned.[91] Most impressive is the *Model Penal Code*, prepared by the American Law Institute, article 213 of which provides that private sexual relations (homosexual or heterosexual) shall be criminal only where children are victimized, coercion is involved, or other "serious imposition is practiced."[92] This basic principle has been implemented in one American jurisdiction as of Jan. 1, 1962, namely Illinois, where a series of criminal law reforms were passed in 1961. One result was the enactment of sections 11-2 and 11-3 of the Criminal Code, which provide that sexually deviate behavior is punishable where force or the threat thereof is involved. Subsequent sections cover cases where minors are involved. The acts of consenting adults committed in private are no longer criminal, be the "deviation" homosexual or heterosexual. New York has to some measure adopted this idea by making consensual, adult acts only misdemeanors.[93]

Summary

The desire to achieve sexual gratification through homosexual acts is indicative of a basic personality trait, whether the actors have accompanying heterosexual desires or not, and regardless of what theory be believed as to the nature and origin of homosexual desires. Such desires and the commission of acts for their gratification have existed throughout history, in all peoples, in all places, and in numbers which, though not subject to precise determination, still indicate that a sizable minority of any given society share them to some extent during some period of their lives. For the most part, these desires, as a matter of practicality, are not subject to cure, even if one assumes, a priori, their curability as a matter of theory. In every American state, excepting Illinois—and to a lesser extent New York—, adult, private, consensual, homosexual acts are unlawful and subject to very severe maximum penalties. These statutes and other sources utilize language in referring to these acts which indicate

[86] It is the writer's belief that the American sodomy laws are violative of the 1st Amendment to the Constitution. No cases so hold, however.

[87] The Wolfenden Report, reprinted in part in Donnelly, Goldstein & Schwartz, Criminal Law 194 (1962).

[88] As quoted in Murtagh, *The Principle of Privacy*, Saturday Review, May 4, 1963, p. 31.

[89] See the Report of this Committee reprinted in part in Donnelly, Goldstein & Schwartz, Criminal Law 142 (1962).

[90] Hart, Law, Liberty and Morality (1963); see also Roberts, Forbidden Freedom (1960).

[91] See note 88 *supra*.

[92] Schwartz, *The Model Penal Code: An Invitation to Law Reform*, 49 A.B.A.J. 452 (1963).

[93] Ill. Rev. Stat. ch. 38, §11-2 (1963): "Deviate Sexual Conduct" is "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another." §11-3: "Any person of the age of 14 years and upwards who, by force or threat of force, compels any other person to perform or submit to any act of deviate sexual conduct commits deviate sexual assault." The penalty is from one to 14 years imprisonment. Subsequent sections apply specifically to, inter alia, the performance of deviate sexual acts with minors. As to New York, see note 43 *supra*.

a deep moral revulsion, a revulsion which explains the sharp disparity between the penalties meted out for such acts and those provided for other acts, such as adulterous ones, which clearly pose a greater threat to social stability. Moreover, these statutes also go so far as to cover heterosexual acts, even between husband and wife, deemed to be contrary to nature. The laws are ineffective, serving neither a deterrent, preventive, nor rehabilitative function. No argument in favor of these statutes, based on social utility, has substance enough to condone the harsh penalties. In fact, these statutes represent the enforcement of a code of morals for their own sake, a grave misuse of American criminal law. Learned and powerful voices, clerical and lay, both here and in England, have been and are being heard for the adoption of laws which recognize that morals and their inculcation are not the province of the state, and that, accordingly, consensual acts of adults in private are beyond the proper scope of the criminal law.[94]

In order for these present laws to be altered, at least the following steps must be taken:

(1) The organized bar must speak up for the enactment of laws which are designed to serve a valid social purpose, and not simply to impose moral concepts which are not properly the concern of the state and are necessarily ineffectual.

(2) The churches and synagogues must support this endeavor by stating clearly that acts of a homosexual nature pose moral questions within the province of ethics and religion, not the law, and uphold the proposition that opposition thereto must come from private beliefs, not public legislation.

(3) The medical profession must discuss and define the nature of homosexuality and, by extricating it from ignorance, seek to induce public comprehension of it as a phenomenon of life—perhaps, if Kinsey is correct, something potentially innate in all creatures.

Until those who have this responsibility exercise it, the electorate will remain in its present state of mass ignorance as to homosexual acts, and, consequently, few legislatures will be able to pass corrective measures.

[94] It has been suggested that a reason for punishment of sex offenders is the conscious or unconscious fear in the rest of us that we might do what the sex offender has done. See WEIHOFEN, THE URGE TO PUNISH 28 (1957). It should also be noted that in many countries adult, consensual homosexual acts in private are already lawful. See CAPRIO & BRENNER, SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS 165–71 (1961).

APPENDIX

ALA. CODE tit. 14, §106 (1958).
ALASKA STAT. §11.40.120 (1962).
ARIZ. REV. STAT. ANN. §§13-651, 13-652 (1956).
ARK. STAT. ANN. §41-813 (Supp. 1963).
CAL. PEN. CODE §286.
COLO. REV. STAT. ANN. §40-2-31 (1953).
CONN. GEN. STAT. REV. §53-216 (1958).
DEL. CODE ANN. tit. 11, §831 (1953).
FLA. STAT. §§800.01, 800.02 (1961).
GA. CODE ANN. §§26-5901, 26-5902 (1953).
HAWAII REV. LAWS §309-34 (1955).
IDAHO CODE ANN. §18-6605 (1948).
ILL. REV. STAT. ch. 38, §§11-2, 11-3, 11-4 (1963).
IND. ANN. STAT. §10-4221 (1956).
IOWA CODE §705.1 (1962).
KAN. GEN. STAT. ANN. §21-907 (1949).
KY. REV. STAT. §436.050 (1962).
LA. REV. STAT. ANN. §14:89 (1951), §14:89.1 (Supp. 1963).
ME. REV. STAT. ANN. ch. 134, §3 (1954).
MD. ANN. CODE art. 27, §554 (1957).
MASS. ANN. LAWS ch. 272, §34 (1956).
MICH. STAT. ANN. §§28.355, 28.356 (1962).
MINN. STAT. ANN. §617.14 (1964).
MISS. CODE ANN. §2413 (1956).
MO. REV. STAT. §563.230 (1959).
MONT. REV. CODES ANN. §94-4118 (1947).
NEB. REV. STAT. §28-919 (1956).
NEV. REV. STAT. §201.190 (Supp. 1963).
N.H. REV. STAT. ANN. §579:9 (1955).
N.J. STAT. ANN. §§2A:143-1, 2A:143-2 (1953).
N.M. STAT. ANN. §§40A-9-6, 40A-9-7 (1964).
N.Y. PEN. LAW §690.
N.C. GEN. STAT. §14-177 (1953).
N.D. CENT. CODE §12-22-07 (1960).
OHIO REV. CODE ANN. §2905.44 (Baldwin 1958).
OKLA. STAT. tit. 21, §886 (1961).
ORE. REV. STAT. §167.040 (Supp. 1963).
PA. STAT. ANN. tit. 18, §4501 (1963).
R.I. GEN. LAWS ANN. §11-10-1 (1956).
S.C. CODE §16-412 (1962).
S.D. CODE §13.1716 (1939).
TENN. CODE ANN. §39-707 (1955).
TEX. PEN. CODE art. 524 (1948).
UTAH CODE ANN. §76-53-22 (1953).
VT. STAT. ANN. tit. 13, §2603 (1959).
VA. CODE ANN. §18-1-212 (1960).
WASH. REV. CODE ANN. §9.79.100 (1961).
W. VA. CODE ANN. §6068 (1961).
WIS. STAT. ANN. §944.17 (1958).
WYO. STAT. ANN. §6-98 (1957).