WASHINGTON UNIVERSITY LAW QUARTERLY

VOLUME 1965

April 1965
pp 220-235

DEVIATE SEXUAL BEHAVIOR UNDER THE NEW ILLINOIS CRIMINAL CODE

Prior to 1961, the Illinois statute, typical of many American statutes concerning deviate sexual behavior,[1] stated:

> The infamous[2] crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term of not less than one year and not more than ten years.[3]

The existence and enforcement of this statute produced several problems: (1) a lack of notice that the conduct in a particular situation was illegal; (2) a pattern of uneven enforcement; (3) the possibility of widespread blackmail; (4) the creation of serious guilt feelings among persons engaging in this behavior; and (5) a pattern of uncontrollable deviate behavior. The new Illinois criminal code, like the Model Penal Code and the Proposed New York Penal Law,[4] is an attempt to solve these problems.

1. See Spence, *The Law of Crime Against Nature*, 32 N.C.L. Rev. 312, 318-19 (1954).

2. "The crime against nature" is one of the offenses labelled as "infamous" by Ill. Laws 1953, at 1529. "[T]he test of an infamous crime . . . [in Illinois] is the nature of the *crime*, and *not* the nature of the *punishment*, which latter is the test of an infamous crime within the meaning of the fifth amendment of the federal constitution." Comment, 5 Ill. L. Rev. 108, 111 (1910).

3. Ill. Laws 1827, ch. 38, § 141, at 132.

4. Ill. Rev. Stat. ch. 38, art. 11 (1961); Model Penal Code art. 213 (Prop. Official Draft 1962) [hereinafter cited as MPC]; Prop. N.Y. Penal Law art. 135 (1964). These three are the only codes which have, in recent years, fully reconsidered proscriptions of sexual offenses. The Model Penal Code provisions were commented upon in the 1955 Tentative Draft Number 4, and, with minor changes and reclassification of sections, were included in the 1962 Tentative Final Draft. The Model code's comments were drawn upon by the Illinois drafters in 1960, and the New York committee in 1964. The Illinois code was adopted and incorporated into the general statutes in 1961; apparently no action has been taken in New York.

Wisconsin and Louisiana completed revisions of their respective penal codes before the tentative drafts of the Model Penal Code were published in 1955. Wisconsin replaced the language of its sodomy section, formerly Wis. Laws 1897, ch. 198, which penalized any person who committed "sodomy, or the crime against nature, with mankind or beast," with a more specific statute. This section (Wis. Crim. Code § 944.17 (1955)), titled "Sexual Perversion," proscribes the commission of an "abnormal act of sexual gratification involving the sex organ of one person and the mouth or anus of another" or "involving his sex organ and the sex organ, mouth, or anus of an animal."

Louisiana included in its revised code an offense called the "crime against nature," (La. Rev. Stat. § 89 (1950)), which is defined as "the unnatural carnal copulation by a human being with another of the same or opposite sex or with an animal." This language is only slightly more explicit than that appearing in the older section (La. Acts 1896, No. 69, § 1), which proscribed the "abominable and detestable crime against nature with mankind or beast with the sectual organs or with the mouth."

The Wisconsin section clearly has defined the proscribed acts, although not the

I. Problems Before 1961

A. *Notice of the Offense*

The most obvious problem that arose under the earlier Illinois statute was a lack of definition of the phrase "crime against nature."[5] Judicial interpretation was required to determine which unnatural sexual acts were prohibited. Faced with this problem, some courts responded by limiting "crime against nature" to the unnatural sexual acts prohibited at common law: anal intercourse between humans and between human and beast.[6] Such conduct was variously referred to at common law as "sodomy,"[7] "bestiality,"[8] or "buggery."[9] Other courts, like Illinois, have found a legislative intention to extend the common law proscription.[10] If the second approach is taken, however, a court is faced with the further problem of deciding what additional abnormal sexual acts are included.

In *Honselman v. People*[11] the defendant, charged with "the infamous crime against nature," contended that: (1) the indictment was fatally defective because it charged only in the language of the statute and thus did not inform him of the nature of the offense with the specificity normally

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tual situations in which the acts are proscribed; Louisiana did neither and therefore its revision is of little value.

5. The court in Honselman v. People, 168 Ill. 172, 48 N.E. 304, 305 (1897), stated: "The legislature has not seen fit to define it further than by the general term, and the records of the courts need not be defiled with the details of different acts which may go to constitute it."

6. Any act not falling within the common law definition would incur criminal penalties only if the legislature had proscribed that act in another statute.

7. "Sodomy" is derived from the name of the biblical town of Sodom, the male inhabitants of which engaged in anal intercourse. See *Genesis* 19:4-14.

8. "Bestiality" is anal intercourse by a man or woman with an animal. Spence, *supra* note 1, at 314; Black, Law Dictionary 203 (4th ed. 1951). The Old Testament refers to sodomy as "an abomination" (*Leviticus* 18:22) and bestiality as "confusion" (*Leviticus* 18:23) and decrees the death penalty for both (sodomy—*Leviticus* 20:13, bestiality—*Leviticus* 20:15). These passages appear to be the source of the adjective "abominable" as used by Blackstone: "the abominable crime not fit to be mentioned among Christians." 4 Blackstone Commentaries *215.

9. "Buggery" is derived from the word "bulgar": a group of Bulgarian heretics were widely accused of deviate practices during the Middle Ages. Mueller, Legal Regulation of Sexual Conduct 53 (1961). The early English law classified all acts between persons, and persons and animals under the title "buggery." 25 Hen. 7, c. 6 (1533).

See the differing definitions of these terms presented in Spence, *supra* note 1, at 314; Sherwin, Sex and the Statutory Law pt. 1, at 35 (1949); 16 Mercer L. Rev. 345 (1964); Bowman & Engle, *A Psychiatric Evaluation of Homosexuality*, 29 Temp. L.Q. 273, 274 (1956). For a complete historical review of deviate sexual practices, see Bowman & Engle, *supra* at 276-77.

10. Spence, *supra* note 1, at 319; 81 C.J.S. *Sodomy* § 1(b)(1) (1953); see Model Penal Code § 207.5, comment (Tent. Draft No. 4, 1955) (now MPC § 213.2).

11. 168 Ill. 172, 48 N.E. 304 (1897).

required in accusatory pleadings; and (2) "the crime against nature" covered only the acts prohibited at common law, and so fellatio was not proscribed. The court, as have others faced with the same problem, rejected the first contention, finding that the charge in the language of the statute was adequate,[12] and rejected the second contention, ruling that the legislature clearly intended to encompass more acts than were prohibited by the common law.[13] In *People v. Smith*,[14] however, the court took the opportunity to limit the scope of the statute. The defendant was charged in the language of the statute; the evidence proved that he had committed cunnilingus. The court reversed and remanded the case, finding the indictment defective for naming the victim incorrectly, and ruling that that act was not covered by the statute because cunnilingus does not involve use of the male sex organ.[15] An accused, as Honselman or Smith, might well believe

12. The name of the man with whom the crime was committed was given, and the count satisfied the requirement of the Criminal Code by stating the offense in the terms and language of the statute. . . . The legislature has not seen fit to define it further than by the general term, and the records of the courts need not be defiled with the details of different acts which may go to constitute it. A statement of the offense in the language of the statute, or so plainly that its nature may be easily understood by the jury, is all that is required. *Id.* at 174-75, 48 N.E. at 305.

As late as 1957 an Illinois court found the offense so offensive to its sense of decency that it refused to relate in detail the commission of the act for which the defendant had been convicted of "the crime against nature." People v. Stevens, 11 Ill. 2d 21, 141 N.E.2d 33 (1957); see Bowman & Engle, *supra* note 9, at 275.

13. [The code] plainly shows that the legislature included in the crime against nature other forms of the offense than sodomy or buggery. It is there enacted: 'Every person convicted of the crime of * * * sodomy, or other crime against nature, * * * shall be deemed infamous,' etc. [See note 2 *supra*.] The method employed in this case is as much against nature, in the sense of being unnatural and against the order of nature, as sodomy or any bestial or unnatural copulation that can be conceived. It is within the statute. Honselman v. People, 168 Ill. 172, 175, 48 N.E. 304, 305 (1897).

This position was contrary to that taken by the majority of state courts, which hold that acts *per os* are not included within the crime against nature. See Spence, *supra* note 1, at 315 n.22.

14. 258 Ill. 502, 101 N.E. 957 (1913).

15. At early common law, both penetration and emission were essential elements of the offenses of rape and sodomy. The difficulty of proving the completion of the crime led to the enactment of a statute providing that proof of penetration alone was sufficient. 9 Geo. 4, c. 31, § 18 (1828). The early Illinois statute (ILL. REV. STAT. § 49, at 179 (1833)) applied this rule to "the crime against nature." The use of the male sex organ was retained as an essential element of the offense.

The court, in remanding *Smith* suggested that the defendant should have been prosecuted under the statute proscribing indecent liberties with children (Ill. Laws 1907, at 266). This statute expressly excepted from its coverage acts of sodomy and "infamous crimes against nature," and so *did* prohibit cunnilingus with a child. In People v. Peck, 314 Ill. 237, 145 N.E. 353 (1924), the defendant, accused of an act of fellatio with a six year old boy, was convicted under this same statute. That act had previously been held to be a "crime against nature" and so was not punishable under the "indecent

that the term "crime against nature" refers only to the acts prohibited at common law; if, after he has committed an act not within the common law definition, the statute is redefined to include that act, criminal sanctions may be imposed without proper notice.

B. *Unequal Law Enforcement*

Deviate sexual behavior is not proscribed in every state,[16] and where it is, enforcement is uneven. The 1948 Kinsey report on the sexual conduct of American males revealed that thirty-seven per cent of the total male population has engaged in some form of homosexual activity.[17] Nevertheless, a survey conducted the following year indicated that less than one per cent of those persons subject to prosecution were actually charged and convicted.[18] "Only enough violators are arrested and convicted to keep what seems at the moment to be substantial amount of peace. Very often that depends upon the personality of the enforcing officer and how he happens to feel at the moment."[19] This is most clearly shown in the regulation of consensual behavior: not only is such conduct almost impossible to detect,[20] but even when it is, criminal proceedings are rarely instituted,[21] and, because of the necessity of corroboration, rarely carried through to conviction.[22]

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liberties" section. Nevertheless, proof of the act was used as evidence of his intent to indecently and sexually arouse the child.

16. See ERNST & LOTH, AMERICAN SEXUAL BEHAVIOR AND THE KINSEY REPORT 128-31 (1948).

17. KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 650 (1948).

18. Note, 17 U. CHI. L. REV. 162, 169-72 (1950). Another commentator has estimated that for every sixty million homosexual acts performed in the United States there are only twenty convictions. DRUMMOND, THE SEX PARADOX 123 (1953). For facts on the English pattern of enforcement, see 122 JUST. P. 796, 817 (1958); COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT 38-39 (1963) [hereinafter cited as WOLFENDEN REPORT].

19. ERNST & LOTH, *op. cit. supra* note 16, at 125. Compare KINSEY, POMEROY & MARTIN, *op. cit. supra* note 17, at 559. "Whether laxity stems from insufficient public pressure, lack of adequate confinement facility, inability to obtain evidence with which to convict, or general disinterest is not determined." DRUMMOND, *op. cit. supra* note 18, at 123.

20. See MUELLER, *op. cit. supra* note 9, at 19-20.

21. It has been suggested that full enforcement will occur only in situations where the offense is directed against children, or violates the public sense of decency. DRUMMOND, *op. cit. supra* note 18, at 122.

22. A common rule is that the testimony of an accomplice or co-participant must be corroborated by independent evidence. "[S]ince sodomy is usually committed very privately the rule of corroboration, as applied, thwarts the conviction of many who are guilty." MAY, LAW OF CRIMES 245 (4th ed. Sears & Weihofen 1938).

C. *Blackmail*

Because the criminal law, as well as prevailing social opinion, condemns *all* acts of deviate behavior prior to 1961, the Illinois offender was constantly liable to blackmail by a victim, a consenting co-participant or a third person with knowledge of the behavior.[23] Although the possible number of actual blackmail situations is high, few are reported[24] because the offenders fear: (1) revelation of the conduct to friends and relatives; (2) subsequent prosecution;[25] and (3) loss of employment.[26] Statutes such as that formerly found in Illinois have been criticized as creating opportunities for the blackmailer—because *all* deviate acts are proscribed, the extortionist has a wider range of victims.[27]

D. *Guilt Feelings*

The Kinsey reports indicate the widespread nature of the practices proscribed by state statutes.[28] It is certain, then, that knowledge of both the criminal sanctions and the social condemnation attached to such behavior produces significant psychic disturbances or guilt feelings in many of the offenders. Doubts have been expressed on the wisdom of criminal provisions that foster the development of psychological problems resulting from sexual behavior that is legally deviate but factually prevalent.[29]

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23. DRUMMOND, *op. cit. supra* note 18, at 129. The common law recognized the seriousness of a threat to reveal past acts of sodomy by making this an exception to the usual requirement that in a robbery prosecution, the alleged threat must be of bodily harm. See PERKINS, CRIMINAL LAW 324-25 (1957); Houston v. Commonwealth, 87 Va. 257, 263-64, 12 S.E. 385, 387 (1890).

24. WOLFENDEN REPORT 70-71. Illinois cases illustrate that a person who has engaged in deviate practices may be placed in a blackmail situation. In Maloney v. People, 229 Ill. 593, 597, 82 N.E. 389, 391 (1907), it was held that a conspiracy to extort from an offender was "an offense . . . against public justice." See also People v. Clarke, 407 Ill. 353, 95 N.E.2d 425 (1950).

25. Bowman & Engle, *supra* note 9, at 297; WOLFENDEN REPORT 70-71.

26. Because they are susceptible to blackmail, homosexuals are considered national security risks by the federal government and are rarely hired. DRUMMOND, *op. cit. supra* note 18, at 129; Bowman & Engle, *supra* note 9, at 299, 315. Risks inherent in private employment are discussed in Bowman & Engle, *supra* note 9, at 301.

27. WOLFENDEN REPORT 70. A threat to use sodomy as a ground for divorce may enable a spouse to extort larger or smaller alimony payments or to acquire certain benefits not awarded by the court. Note, 12 U. FLA. L. REV. 83, 88-89 (1959).

28. KINSEY, POMEROY & MARTIN, *op. cit. supra* note 17, at 623, 650-51 (sodomy); 670 (bestiality).

29. MUELLER, *op. cit. supra* note 9, at 18; DRUMMOND, *op. cit. supra* note 18, at [illegible]; KINSEY, POMEROY & MARTIN, *op. cit. supra* note 17, at 610, 633; *cf.* ERNST & LOVE, *op. cit. supra* note 16, at 112.

E. *Uncontrollable Behavior*

Some commentators have argued that persons who engage in deviate sexual conduct are suffering from a mental disease and that many of these persons are unable to control their sexual impulses. Therefore, a statute providing criminal sanctions for deviate behavior imposes strict liability regardless of one's ability to direct and control his behavior. Such criminal liability is clearly in derogation of the common law tradition of individual responsibility for criminal acts.

II. Solution

The new Illinois article, like the Model and proposed New York codes, attempts to solve these problems by clearly defining terms and clarifying the language and content of the various sections of the criminal law. In addition, the Illinois drafters restructured the code around four considerations that were believed to be within the realm of legislative activity. Each of the sections of article 11 (Sex Offenses) is concerned with one of these interests:

> (1) protection of the individual against forcible acts; (2) protection of the young and immature from the sexual advances of older and more mature individuals; (3) protection of the public from open and notorious conduct which disturbs the peace, tends to promote breaches of the peace, or openly flouts accepted standards of morality in the community; and (4) protection of the institution of marriage and normal family relationships from sexual conduct which tends to destroy them.[30]

The Illinois drafters did not focus on the religious tenets or social customs purporting to repress conduct; they looked to its *effect*, not its moral acceptability.

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30. Ill. Rev. Stat. ch. 38, art. 11, comment (1961). The comments continue:
> It will be noted that the key interests sought to be protected are freedom from force for everyone; freedom for the unfair exploitation of youth before they are mature enough to make valid individual judgments; freedom of the public from "open and notorious" acts; and the community's interest in preserving the monogamous marriage and family institution which is the current basis of our social and moral structure. The Committee considers the protection of these interests sufficiently vital to warrant criminal sanctions for their violations. *Ibid.*

The law was seen as a means:
> to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence. Wolfenden Report 23.

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A. *Notice of the Offense*

1. *What Conduct is Proscribed?*

To provide sufficient notice of the exact character of the proscribed behavior, the new Illinois criminal code,[31] like the Model Penal Code[32] and the Proposed New York Penal Law,[33] includes a specific definition of deviate sexual conduct. Section 11-2 provides: " 'Deviate sexual conduct' for the purpose of this Article, means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another."[34]

These three codes subject acts between persons to regulation; however, they do not all regulate acts between a person and an animal. The committee for the new Illinois criminal code, adopting the position that the latter acts "are usually brief, youthful 'experiments' rather than part of a pattern of conduct that either contributes to or constitutes a significant degeneration of the individual involved,"[35] drafted section 11-2, defining "deviate sexual conduct" to include only all unnatural acts of sexual gratification between humans.[36] The New York code also defines deviate sexual intercourse to be "deviate conduct between persons;"[37] however, acts with animals are proscribed in another section of the New York law.[38] The

31. ILL. REV. STAT. ch. 38, § 1-2 (1961), provides:
The provisions of this Code shall be construed in accordance with the general purpose hereof, to:
(a) Forbid and prevent the commission of offenses;
(b) Define adequately the act and mental state which constitute each offense . . . .

32. MPC § 213.2, titled "Deviate Sexual Intercourse by Force or Imposition," proscribed "sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal."

33. PROP. N.Y. PENAL LAW § 135.00(2) (1964) defines deviate sexual intercourse as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vagina."

34. ILL. REV. STAT. ch. 38, § 11-2 (1961). This definition obviates the problem encountered in *Honselman* and *Smith*, since now (1) each of the acts involved in those cases would fall within the statute, and (2) sufficient notice of the nature of the offense would be provided.

35. ILL. REV. STAT. ch. 38, § 11-2, comment (1961). The committee comments stated that: "Focusing public attention on the person who happens to be found in such an act serves no useful social purpose and may seriously impair the development of the accused to a normal life." The committee, therefore, did not proscribe criminally unnatural acts between humans and animals unless such acts were covered by disorderly conduct or similar statutes. *Ibid.* See also KINSEY, POMEROY & MARTIN, *op. cit. supra* note 17, at 667-78; KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 502-09 (1953).

36. See text accompanying note 34 *supra*.

37. See note 33 *supra*.

38. PROP. N.Y. PENAL LAW § 135.55 (1964) provides: "A person is guilty of bestiality when he engages in sexual conduct with an animal or a dead human body." The attitude of the New York revisers, similar to the attitude of the Illinois committee

l code differs from the Illinois and New York codes by defining deviexual intercourse to include acts with animals;[39] these acts, however, are not penalized.[40]

Although each code differs in its basic definition of "deviate sexual conduct" or "deviate sexual intercourse," each uses its own definition consistently. Whenever used, the phrase refers only to the acts mentioned in the definition; any other type of behavior must be separately proscribed.[41]

2. *In What Circumstances Is This Conduct Illegal?*

To determine whether sufficient notice is given to the defendant concerning the circumstances in which defined deviate behavior is illegal, the provisions of the Illinois code may be analyzed with reference to the four interests articulated by the revising committee. When the purpose of the legislation is defined in terms of these interests, there is a broad range of conduct that is not proscribed: consensual behavior between unrelated adults.[42] The Illinois, New York, and Model codes are each, more or less explicitly, concerned with the four enumerated interests and none proscribes deviate sexual conduct performed in private by consenting adults.[43] This is best revealed by the definitions of deviate behavior set forth in the New York and Model codes, specifically excluding conduct between married couples,[44] and the failure of each code to proscribe in any section private conduct between other consenting adults.

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was that "the offender is a sick individual who injures himself more than he does the p Therefore, misdemeanor punishment is more than adequate for this crime." N.Y. PENAL LAW § 135.55, comment (1964).

39. See note 32 *supra*.

40. See MPC §§ 213.2-.4. In each situation in which deviate sexual intercourse is declared illegal by the Model code, the offender and the victim are always humans.

41. *E.g.*, ILL. REV. STAT. ch. 38, §§ 11-4 (1961) (lewd fondling or touching), 11-5 (lewd fondling or touching, any lewd act), 11-9 (lewd exposure of the body, lewd fondling or caress); MPC §§ 213.4 (sexual contact), 213.5 (indecent exposure), 251.1 (open lewdness); PROP. N.Y. PENAL LAW §§ 135.00(3) (1964) (sexual contact), 250.15 (a lewd or sexual act).

42. See generally WOLFENDEN REPORT 23-24. The members of the drafting committee agreed that such behavior falls within "a realm of private morality and immorality which is, in brief and crude terms, not the law's business." *Id.* at 48.

43. See MODEL PENAL CODE § 207.5(1), comment (Tent. Draft No. 4, 1955) (now MPC § 213.2). The proposed New York code provides:

> 1. Whether or not specifically stated, it is an element of every offense defined in this article that the criminal sexual act was committed without consent of the victim.

PROP. N.Y. PENAL LAW § 135.05 (1964).

"[The Illinois code] is not intended to proscribe any sexual conduct between consenting adults unless such conduct adversely affects one of the key interests sought to be protected." ILL. REV. STAT. ch. 38, art. 11, comment (1961).

44. See the definitions in notes 32 and 33 *supra*.

a. protection of the individual from force. Section 11-3 of the new Illinois code ("Deviate Sexual Assault") provides protection of the individual from deviate sexual conduct involving the use of force.[45] It does not cover acts *consented to* by young children; these are proscribed in sections drafted specifically to protect youth.[46]

The Model Penal Code and the Proposed New York Penal Law also proscribe forcible deviate sexual behavior. The Model code terms behavior involving force a felony of the second degree, and that involving other imposition, a felony of the third degree.[47] Under New York law such behavior, classified as one of the greatest of felonies, is included within the first degree sodomy section.[48] In contrast to the Illinois provision, however, neither of these codes confines the proscription to forcible acts; each includes deviate conduct with a (consenting) child,[49] or a physically helpless person.[50]

b. protection of youth. The Illinois drafters, seeking to protect child-

45. ILL. REV. STAT. ch. 38, § 11-3 (1961), provides:

> 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.

In parallel fashion, "rape" is defined in terms of sexual intercourse accompanied by the use of force. ILL. REV. STAT. ch 38, § 11-1 (1961). There is no longer an offense of "statutory rape"; sexual activity with a person below the age of consent (eighteen years) is proscribed in the sections dealing exclusively with the protection of children. ILL. REV. STAT. ch. 38, §§ 11-4 to -6 (1961).

Section 11-3 fails to define "force or threat of force." It was the intent of the drafters that the courts apply the requirements and standards developed in Illinois rape cases to the forceful deviate conduct situations. ILL. REV. STAT. ch. 38, § 11-3, comments (1961). This appears to be a reasonable level of notice, especially since in four of the five cases prosecuted under the older Illinois sodomy section, the defendant had also been charged with rape. People v. Haran, 27 Ill. 2d 229, 188 N.E.2d 707 (1963) (two indictments); People v. O'Connor, 412 Ill. 304, 106 N.E.2d 176 (1952); People v. De Frates, 395 Ill. 439, 70 N.E.2d 591 (1946) (separate counts in same indictment); People v. Elder, 382 Ill. 388, 47 N.E.2d 694 (1943) (three indictments). None of the appeals in these cases was on the issue of the standards used to evaluate "force or threat of force." The fifth case, People v. Funches, 17 Ill. 2d 529, 162 N.E.2d 393 (1959), involved a deviate sexual act by a man on another man, allegedly at knifepoint.

46. ILL. REV. STAT. ch. 38, §§ 11-4 to -6 (1961).

47. MPC § 213.2, "Deviate Sexual Intercourse by Force or Imposition," describes situations parallel to those included in § 213.1, "Rape and Related Offenses."

48. PROP. N.Y. PENAL LAW § 135.50 (1964), "Sodomy in the first degree," parallels § 135.35, which defines first degree rape.

49. The Model code proscribes such behavior with a person less than ten years old; the New York provision, under age eleven.

50. In addition, the Model code covers acts committed on (1) a person submitting through fear; (2) a person whose mental conditions "renders him incapable of appraising the nature of his conduct"; or (3) a person who is unaware of the sexual character of the activity.

f[illegible] exploitation by more mature individuals and to discourage adolescent [illegible]al experimentation,[51] proposed three offenses to prohibit all forms of sexual activity with children: sections 11-4, "Indecent Liberties with a Child";[52] 11-5, "Contributing to the Sexual Delinquency of a Child";[53] and 11-6, "Indecent Solicitation of a Child."[54] This categorization[55]

51. See ILL. REV. STAT. ch. 38, §§ 11-3, 11-5, comments (1961).

52. Section 11-4 provides:

(a) Any person of the age of 17 years and upwards who performs or submits to any of the following acts with a child under the age of 16 commits indecent liberties with a child:

. . .

(2) Any act of deviate sexual conduct;

. . . .

See People v. Freedman, 4 Ill. 2d 414, 123 N.E.2d 317 (1954), for an earlier definition of the term "indecent liberties."

53. Section 11-5 provides:

(a) Any person of the age of 14 years and upwards who performs or submits to any of the following acts with any person under the age of 18 contributes to the sexual delinquency of a child:

. . .

(2) Any act of deviate sexual conduct;

. . . .

See People v. Ostrowski, 334 Ill. App. 494, 80 N.E.2d 89, *aff'd*, 83 N.E.2d 276 (1948), for a discussion of the range of conduct covered by the "Contributing" provision.

54. Section 11-6 provides:

(a) Any person of the age of 17 years and upwards who solicits a child under the age of 13 to do any act, which if done would be an indecent liberty with a child or an act of contributing to the sexual delinquency of a child commits indecent solicitation of a child.

55. The sanctions of § 11-4, a felony, are imposed only when a two-year age disparity is shown; *i.e.*, when a person seventeen years or older performs or submits to an ac[illegible] deviate sexual conduct with a child under sixteen. But under § 11-5, a mis-[illegible]or, the victim can be older than or the same age as the offender—the minimum age of an offender is fourteen, and the maximum age of a victim is eighteen. Although every violator of § 11-4(a)(2) (deviate sexual conduct) is also subject to punishment under § 11-5(a)(2), the opposite is not true; therefore, the "Contributing" section is a lesser included offense in relation to the "Indecent Liberties" provision.

The minimum age provision, carried over from the earlier rape statutes, is based on the common law presumption that a male under fourteen years was incapable of committing rape. See ILL. REV. STAT. ch. 38, § 11-1, comment (1961). Because females may, without parental consent, contract a valid marriage in Illinois at eighteen, that was chosen as the age of consent to sexual intercourse or deviate sexual conduct. See ILL. REV. STAT. ch. 38, § 11-5, comment (1961). The New York code drafters believed that "when considered within the framework of modern American culture, seventeen is a more realistic age of consent than eighteen." PROP. N.Y. PENAL LAW 342 (1964).

Section 11-6, "Indecent Solicitation of a Child," is the least serious offense, since no overt sexual act need be involved. The proscribed conduct is the solicitation by a person seventeen years or older of a child under thirteen to do an act declared illegal by § 11-4 or 11-5.

Although the younger participant in such acts is usually referred to as the "victim," this does not necessarily mean that he has been subject to coercion. "Generally, all three sections deal with non-violent acts with children, and the usual situations where actual consent of the child to the specific course of conduct is obtained." ILL. REV. STAT. ch. 38,

allows the prosecutor to charge a defendant with a specific act against children.[56]

The Model Penal Code and the Proposed New York Penal Law do not categorize sexual offenses according to the interests sought to be protected, but rather include provisions concerning children in various other sections. For example, the Model code includes conduct with children in the section entitled "Sexual Assault;"[57] children are protected in the New York code in sections dealing with sodomy and sexual abuse.[58]

In one respect the codes are similar: because each is aimed at the prevention of sexual exploitation of youth, each punishes behavior with younger more severely than with older children. For example, the New York code grades its sodomy provisions according to the age of the victim.[59] Illinois declares sexual conduct with a child under thirteen to be a felony; with a child under eighteen, a misdemeanor.[60]

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§ 11-3, comment (1961). An attempt to commit an offense defined by §§ 11-4 to -6, is proscribed by the general attempt provision of the code. ILL. REV. STAT. ch. 38, § (1961).

56. See discussion *supra* note 15.

57. MPC § 213.4. This covers conduct (a) with a child less than ten years of age; (b) if the offender is at least four years older than his victim, a person under sixteen years of age; or (c) if the offender is legally responsible for the victim, a person under twenty-one years of age.

58. PROP. N.Y. PENAL LAW §§ 135.40-.65 (1964).

59. PROP. N.Y. PENAL LAW §§ 135.40-.55 (1964).

60. See note 55 *supra*. If People v. Chism, 6 Ill. 2d 262, 128 N.E.2d 729 (1955) and People v. Jones, 6 Ill. 2d 252, 128 N.E.2d 739 (1955), two cases prosecuted under the older provisions, arose today, they would point up some of the problems of arbitrary age categories. Jones, thirty-four, and his companion, Chism, presumably about twenty-four, performed homosexual acts with two teenage boys. Both defendants were convicted. Jones, whose partner was fifteen, was sentenced to four to eight years in the penitentiary; Chism, whose partner was sixteen, to two to five years. Under the 1961 code, Jones would be guilty of a felony (§ 11-4), carrying a sentence of one to twenty years in the penitentiary and Chism would be guilty of a misdemeanor (§ 11-5), carrying a maximum fine of one thousand dollars, or a maximum sentence of one year in an institution other than the state penitentiary, or both.

The nineteen reported cases prosecuted under the old crime against nature section included thirteen involving sexual misconduct with children. Today ten would be covered by the proscription of § 11-4 because the victim was under sixteen years of age: People v. Glenn, 25 Ill. 2d 82, 182 N.E.2d 670 (1962); People v. Jones, *supra*; People v. Sampson, 1 Ill. 2d 399, 115 N.E.2d 627 (1953); People v. Whitman, 406 Ill. 593, 94 N.E.2d 506 (1950); People v. Kraus, 395 Ill. 233, 69 N.E.2d 885 (1946); People v. Fitzgibbons, 346 Ill. 338, 179 N.E. 106 (1931); People v. Smith, 258 Ill. 502, 101 N.E. 957 (1913); People v. Abrams, 249 Ill. 619, 94 N.E. 985 (1911); Kelly v. People, 192 Ill. 119, 61 N.E. 425 (1901); Honselman v. People, 168 Ill. 172, 48 N.E. 304 (1897). The other three would fall under § 11-5 because the victim was over fifteen but under eighteen. People v. Stevens, 11 Ill. 2d 21, 141 N.E.2d 33 (1957); People v. Chism, *supra*; People v. Dabbs, 370 Ill. 378, 19 N.E.2d 175 (1938).

The Model code penalizes consensual deviate behavior with a child less than sixteen only if the accused is four years older than his partner;[61] the New York provisions do not proscribe consensual acts.[62] The Illinois drafters alone sought to curtail sexual experimentation between youths as well as exploitation of children,[63] and so proscribed deviate behavior between adolescents of specified ages.[64]

c. protection of public morals. To prevent shocking and embarrassing displays of sexual activities,[65] the Illinois code proscribes in section 11-9 ("Public Indecency"), deviate sexual conduct in a public place.[66] The Model Penal Code also defines deviate behavior in a public place as an act of "public indecency";[67] the proposed New York code includes this offense under two sections: "Disorderly Conduct"[68] and "Loitering."[69]

Although each code does proscribe deviate behavior that might constitute an affront to those observing it,[70] not all proscribe the solicitation of

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61. MPC § 213.4.

62. See note 43 *supra.*

63. "It is intended that so far as this misdemeanor provision [§ 11-5] is concerned, that sexual activities with children under 18 to be discouraged generally, regardless of their prior sexual experience or inexperience." ILL. REV. STAT. ch. 38, § 11-3, comment (1961).

64. See note 55 *supra.* However each code takes a different stand on the question of affirmative defenses. The New York code (PROP. N.Y. PENAL LAW § 135.10(2) (1964)) does not allow the defense of a mistake in the age of the victim who is under seventeen years. This, in effect, is strict liability for sexual misbehavior with children. The Model code (MPC § 213.6(1)) holds the offender absolutely responsible for deviate sexual conduct with pre-pubertal children, but provides the affirmative defense for offenses with children over ten. Under the Illinois article, one accused of the felony "Indecent Liberties" is provided certain defenses: (1) a reasonable belief that the child was sixteen or older; (2) the child's activities as a prostitute; and (3) the previous marriage of the child. The drafters believed that if any of these were proven, the key element of exploitation, the knowing and deliberate abuse of the young by older persons, is absent and the conduct should not be proscribed under this section. See ILL. REV. STAT. ch. 38, § 11-4, comment (1961). Because the two misdemeanor sections, §§ 11-5 to -6, are not primarily directed toward the exploitation of youth, affirmative defenses are not available.

65. See ILL. REV. STAT. ch. 38, § 11-9, comment (1961).

66. ILL. REV. STAT. ch. 38, § 11-9 (1961). "Public place" is defined as "any place where the conduct may reasonably be expected to be viewed by others." ILL. REV. STAT. ch. 38, § 11-9(b) (1961).

67. MPC § 251.1, "Open Lewdness," is found in Article 251, "Public Indecency." A related offense, "Indecent Exposure," is defined in § 213.5.

68. PROP. N.Y. PENAL LAW § 250.05(4) (1964).

69. PROP. N.Y. PENAL LAW § 250.15(3) (1964). In § 250.00, "public place" is defined as "a place to which the public or a substantial group of people has access" and a number of locations are identified as fitting this description.

70. It is the very affront itself which refutes the argument: "[I]t would be . . . ludicrous that . . . [two consenting adults] should be liable to . . . [the maximum punish-

this conduct. The Model code, in an attempt to avoid the "indiscrimin[ate] seeking or making one's self available for deviate sexual relations,"[71] defines as a petty misdemeanor loitering for the purpose of soliciting or being solicited.[72] The proposed New York law also proscribes this conduct.[73] The Illinois drafters, however, considering solicitation as "essentially a private rather than a public irritation,"[74] not likely to cause affront to others, did not proscribe it.

The practice of prostitution may also be regarded as conduct from which the public morals must be protected. Each code has prohibited deviate sexual conduct performed or submitted to by a person[75] for money.[76] The Illinois and Model codes have attached minor criminal sanctions to patronizing a prostitute, in an effort to eliminate prostitution itself.[77] New York does not prohibit such conduct.

d. protection of the family. Both the proposed New York and the Model codes group the statute defining incest with other sections concerning offenses against the family.[78] The Illinois code, however, has included the offense within article 11 ("Sex Offenses")[79] in an attempt to protect society's interests in stable marriage and family relationships from the threat of deviate sexual conduct.

Two considerations guided the Illinois drafters in the formulation of their incest sections. The first, "the biological risk of genetically defective offspring,"[80] was the sole concern of the New York and Model codes, which

ment] because they happened to be found committing in public an act which, if committed in private, would not be criminal at all." WOLFENDEN REPORT 61.

71. MPC § 251.3 and accompanying comments.

72. MPC § 251.3.

73. PROP. N.Y. PENAL LAW § 250.15(3) (1964). A person convicted of this "violation" is liable for only a fine or a maximum imprisonment of fifteen days.

74. ILL. REV. STAT. ch. 38, § 11-9, comment (1961).

75. An early Illinois case held that male prostitutes were not covered under the previous statute. People v. Rice, 277 Ill. 521, 115 N.E. 631 (1917). However, the drafters phrased this section so that men as well as women are now covered. ILL. REV. STAT. ch. 38, § 11-14, comment (1961). For similar recommendations made by the English investigating committee, see WOLFENDEN REPORT 54-55.

76. ILL. REV. STAT. ch. 38, § 11-14 (1961); PROP. N.Y. PENAL LAW § 230.00 (1964); MPC § 251.2(1). The Illinois and Model codes specifically include deviate sexual behavior within the definition of proscribed conduct; although the New York code refers only to "any sexual act," the drafters of that section apparently believed that deviate behavior would be covered. PROP. N.Y. PENAL LAW 384 (1964).

77. MPC § 251.2(5); ILL. REV. STAT. ch. 38, § 11-18 (1961). The early Illinois case of Raymond v. People, 9 Ill. App. 344, 346 (1881) defines a "patron" of a brothel.

78. PROP. N.Y. PENAL LAW § 260.25 (1964); MPC § 230.2.

79. ILL. REV. STAT. ch. 38, §§ 11-10 to -11 (1961).

80. ILL. REV. STAT. ch. 38, § 11-10, comment (1961).

forbid only sexual intercourse, not deviate conduct. The second, the concern for the abuse of family authority,[81] was also considered by the Illinois drafters and led them to include deviate behavior within the proscription of sections 11-10 ("Aggravated Incest") and 11-11 ("Incest").[82] This second consideration was also the basis for the distinction between the two sections. The drafters, believing that "Aggravated Incest," sexual relations between father and daughter,[83] posed the greatest threat to the normal family relationship, proscribed a greater penalty for "Aggravated Incest" than for "Incest," sexual relations between mother and son or brother and sister.[84] The behavior sought to be prohibited is heterosexual;[85] deviate conduct between siblings of the same sex is not forbidden under the incest sections.[86] Unless such conduct is covered under the sections concerned with the protection of individuals from force, of children from the advances of more mature individuals or the effects of youthful sexual experimentation, or of society from annoyances, it is not proscribed.

B. *Unequal Law Enforcement*

By not proscribing private consensual behavior and by structuring the new code around the four enumerated interests, the drafters have made pos-

81. The drafters of the Model Penal Code evaluated five considerations: (1) the impact of religious tenets; (2) the science of genetics; (3) sociological and anthropological objectives, *i.e.*, the promotion of the solidarity of the family unit, of the cohesiveness of the larger social group, and the cultural diffusion; (4) the general intense hostility to this behavior; and (5) the protection of young and dependent females. MODEL PENAL CODE § 207.3, comment (Tent. Draft No. 4, 1955) (now MPC § 230.2).

82. The tentative final draft of the new Illinois criminal code did not proscribe deviate behavior between mother and son or brother and sister; the possibility of biological risk was the only element considered. However, the section as enacted *does* proscribe this type of behavior; there is no comment on the change in position of the drafters. See ILL. REV. STAT. ch. 38, § 11-11, comment (1961).

83. A "daughter" is defined as "a blood daughter regardless of legitimacy or age; and . . . a stepdaughter or an adopted daughter under the age of 18." ILL. REV. STAT. ch. 38, § 11-10 (1961). Sexual intercourse is absolutely proscribed between father and blood daughter according to the first consideration, and deviate sexual activity is penalized under the second. In the case of a step or adopted daughter, only the second consideration is relevant, so the proscription is not absolute and applies only to a daughter under the age of eighteen.

84. Section 11-10 provides for imprisonment of from one to twenty years in the state penitentiary; § 11-11, of from one to ten years. A deviate sexual act between a fifteen year old boy and a younger girl is a misdememeanor under § 11-5 ("Contributing to the Delinquency of a Child") but if they are brother and sister, they are guilty of a felony (§ 11-11).

85. See People v. Whitman, 406 Ill. 593, 94 N.E.2d 506 (1950).

86. The range of acts covered by the statute was discussed in People v. Knapp, 15 Ill. 2d 450, 155 N.E.2d 565 (1959). The relationship of the participants has been held to be an essential element of the offense. People v. Duszkewycz, 27 Ill. 2d 257, 189 N.E. 2d 299 (1963); People v. Laughery, 396 Ill. 213, 71 N.E.2d 46 (1947).

sible full enforcement of the new Illinois code. The situations in which deviate behavior is now proscribed are those which will in some manner be brought to the attention of the authorities and which will be considered suitable for full prosecution.[87] The victim of a forcible assault or the affronted observer of an act of public indecency reasonably may be expected to protest such behavior; a child or his parents, the victim, or a relative may complain of conduct constituting an exploitation of youth or a violation of normal family relationships. Thus the authorities will learn of most of these violations as they would not of private consensual adult acts. Although the Model and New York codes do not classify sexual offenses according to the interests, they, like the Illinois law, do not proscribe adult consensual behavior, and so the offenses described in their respective sections are susceptible of full enforcement.

C. *Blackmail*

As long as any given type of behavior is condemned by the existing social mores, blackmail of persons engaging in that behavior will persist, whether or not these persons are subject to criminal prosecution.[88] Therefore, the exclusion of consensual acts from the enumerated situations in which deviate sexual conduct is illegal may have no significant effect on the incidence of blackmail. The removal of criminal sanctions will simply "withdraw the state from partnership in blackmail."[89]

D. *Guilt Feelings*

The removal of the criminal sanction for consensual sodomitic behavior may help eliminate guilt feelings caused by the involvement in illegal acts of sexual gratification. But this elimination is limited by the persisting non-legal taboos on the conduct. A man may well have guilt feelings at least as strong concerning behavior condemned socially as that proscribed legally. The strong religious sanction on any sexual behavior except normal hetero-

87. See WOLFENDEN REPORT 40, 58.

88. See DEPARTMENT OF CRIMINAL SCIENCE, CAMBRIDGE UNIVERSITY, SEXUAL OFFENCES 430 (1957).

89. Note, 12 U. FLA. L. REV. 83, 88 (1959). The Model Penal Code has made one attempt to reduce spite complaints, which often closely resemble blackmail threats, by requiring that all complaints of sexual offenses against children be promptly filed. The proper authorities must be notified within three months of the occurrence of the act or, in cases involving children under sixteen, within three months of the time a parent or guardian learns of the matter. MPC § 213.6(5). An example of a prosecution that would have been barred under such a provision is Honselman v. People, 168 Ill. 172, 48 N.E. 304 (1897), where the defendant, a fair grounds guard, had put the fourteen year old complainant out of the fair grounds a few months before the complaint was filed. The alleged deviate sexual offense had been committed *one year* before. An English committee (WOLFENDEN REPORT 85) has suggested that all complaints of sexual offenses be filed within twelve months.

...al relations is one strong inhibiting element; unfavorable peer group consensus is another. Arguably, then, the incidence of such psychic disturbances is unaffected by the enactment of this new approach to sexual offenses.

E. *Uncontrollable Behavior*

Under the view that deviate sexual conduct *is* uncontrollable, the Illinois, Model and New York codes may be seen as proscribing this conduct in situations in which it is only directed against others to their physical or moral harm or shock and embarrassment. A pattern of behavior in private deviate activity with other consenting, unrelated adults harms no one and so the uncontrollability of the conduct is immaterial.

The view that persons engaged in deviate sexual conduct are ill or irresponsible is not universally accepted. Considerable evidence exists that they are no less able to control their sexual conduct,[90] to respond to medical treatment,[91] or to refrain from recidivism[92] than other criminal offenders. If this behavior is *not* uncontrollable, the codes reflect community sentiment concerning the direction of sexual intent against a physical victim, a child, the public, or a close relative.

Conclusion

The drafters of the new Illinois criminal code attempted to solve the problems resulting from the existence and enforcement of an ambiguous "crime against nature" provision by grouping the criminal sanctions around four interests considered to be within the realm of legislative activity. Although the total effectiveness of this approach is still undetermined, tentative conclusions may be drawn.

The specific definition of proscribed deviate behavior, section 11-2, and the subsequent delineation of situations in which it is illegal eliminates the problem of lack of notice to the defendant. Similarly, the pattern of uneven enforcement will diminish because the careful statement of the interests and drafting of the article limits the proscription to that conduct likely to be noticed and punished. The other problems, however, have not been solved. The incidence of blackmail and the existence or intensity of personal guilt feelings are largely independent of statutory proscription and will not be significantly affected by the removal of criminal sanctions. Uncontrollable behavior is completely independent of either statutory or social sanctions, and so will not be at all affected by the new criminal code.

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90. See Wolfenden Report 34.

91. *Id.* at 105.

92. *Id.* at 58-59; Department of Criminal Science, Cambridge University, *op. cit. supra* note 88, at 435. Professor Paul W. Tappan has concluded that "[United States] sex offenders are among the least recidivous of all types of criminals. They do not characteristically repeat as do . . . burglars, aronists, and thieves." *Id.* at 513.