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THE SEX OFFENDER PROVISIONS OF THE PROPOSED NEW MARYLAND CRIMINAL CODE: SHOULD PRIVATE, CONSENTING ADULT HOMOSEXUAL BEHAVIOR BE EXCLUDED?

By ROBERT G. FISHER*

The Maryland Commission on Criminal Law¹ has tentatively approved a draft of a proposed sex offender code for the State. It is to be included in a comprehensive, substantive Criminal Code now being drafted and intended to be published soon in tentative form for consideration, criticism and suggestions. As drafted, the sex offender part of the proposed code would continue to penalize sex offenses against non-consenting victims (rape and involuntary sodomy being prime examples) or against public decency. However, by a Commission vote of twelve to two, it would no longer include as crimes the voluntary, private homosexual acts of adults. This would be a substantial departure from the sodomy provisions of the present Maryland Code.² The proposed change presents an issue of legislative policy which may well rival capital punishment and abortion in its potential for arousing public controversy.

This article is offered frankly to encourage a thorough airing of all sides of the issue before the proposals reach the Legislature. The present law in Maryland and other jurisdictions will be reviewed, as will the recommendations of the now-famous Wolfenden Report which led to reform in England, the American Law Institute's Model Penal Code,

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1. The Maryland Commission on Criminal Law was established by Governor Tawes in 1965. Members of the Commission now are:

Franklin G. Allen, Esq. (Member, Subcommittee on Sex Offenses); Honorable Mary Arabian; Honorable John R. Hargrove; Robert C. Heeney, Esq.; Josiah F. Henry, Jr., Esq.; Honorable Thomas J. Kenney; H. Edgar Lentz, Esq.; Honorable James Macgill; Honorable John S. McInerney; Honorable Charles E. Moylan, Jr.; Alan Hamilton Murrell, Esq.; Mr. Julian S. Neal; Honorable Reuben Oppenheimer; Honorable Daniel T. Prettyman; Dr. Jonas R. Rapoport (Chairman, Subcommittee on Sex Offenses); John W. Sause, Jr., Esq.; Robert M. Thomas, Esq.; and Mr. Paul C. Wolman, (Member, Subcommittee on Sex Offenses); Hon. Frederick W. Brune (Chairman).

2. MD. ANN. CODE art. 27, §§ 553-54 (1967).

and the recent Hooker Report prepared for the National Institute for Mental Health. However, it is submitted that the Maryland Commission heard a new argument for reform which seems to have been overlooked by the authors of prior reports. The crux of this argument is that the legitimatizing of homosexual behavior between consenting *adults* would improve both deterrence and the enforcement of laws with respect to the type of homosexual behavior of greatest concern to society — acts between an adult and a minor victim. This argument should commend reform even to those who believe philosophically that the criminal law ought to be used to repress homosexual behavior to the greatest extent practicable.

I. THE PRESENT LAW

Homosexual acts between persons of any age and under any circumstances have long been prohibited in Anglo-American law under the titles "Sodomy," "Unnatural Crime," or "Crime Against Nature." At common law, sodomy included buggery, or rectal coitus, and acts of bestiality committed with animals, but did not include fellatio, where the act is by mouth. Text writers are not in agreement as to the origin of the crime. According to one authority,³ the crime against nature was a felony at common law in England and therefore punishable by death.⁴ Another states that the crime originated in the ecclesiastical courts but soon was made a felony by statute.⁵

Typically expanded to include sexual acts by mouth, present sodomy legislation prohibits homosexual behavior in every state except Illinois, where the crime was eliminated as to acts between consenting adults in private in 1961.⁶ One other state, Connecticut, has passed legislation, effective in 1971, limiting sodomy to coerced acts, public acts, and acts involving minors.⁷

Sodomy usually is punishable in the United States by a long prison sentence like the ten year maximum provided in Maryland.⁸ Some states, though, have recently reduced the crime to a misdemeanor carrying maximum penalties as low as New York's three month jail sentence or \$500.00 fine.⁹ The statutory penalties may be misleading. For example, Maryland homosexuals are occasionally prosecuted in the Municipal Court of Baltimore City for the prostitution offense of soliciting.¹⁰ Solicitation is apt to carry a fine of fifty dollars to

3. W. CLARK & W. MARSHALL, *CRIMES* § 11.07 (7th ed. 1967).

4. See 25 Hen. 8, c. 6 (1533), which prohibited buggery with man or beast under penalty of death.

Another capital crime of this "enlightened" era was the killing of the King's deer.

5. R. PERKINS, *ON CRIMINAL LAW* 389 (2d ed. 1969).

6. The present Illinois law, ILL. ANN. STAT. ch. 38, § 11-2 (Smith-Hurd 1964), disregards the former term "crime against nature" ILL. REV. STAT. ch. 38, §§ 141-42 (1959) and substitutes the term "deviate sexual conduct." The new section merely defines "deviate sexual conduct" rather than specifying an offense.

7. See PENAL CODE §§ 76-81, CONN. GEN. STAT. ANN. (1969).

8. MD. ANN. CODE art. 27, § 553 (1967).

9. See N.Y. PENAL LAW §§ 70.15(2), 80.05(2), 130.38 (McKinney 1967).

10. See MD. ANN. CODE art. 27, § 15(d), (e), (g) (1967). The object of this solicitation is usually a decoy policeman from the Vice Squad.

\$200.00 or a short jail sentence. Prosecutions for sodomy and perverted practices also occur at the circuit court level in Maryland and prison sentences of several years occasionally are imposed.¹¹ In Washington, D.C., homosexuals often simply forfeit a station house bail fixed as low as twenty-five dollars and avoid trial.

However, the size of the judicial penalty imposed is not always an accurate indicant of the punitive effect that apprehension and conviction have upon a homosexual. Exposure often means the end of a career, especially for one in government service. For two of a group of middle class Marylanders who were arrested in a public lavatory at Loch Raven reservoir in 1965, the disgrace of apprehension precipitated their suicides.¹² On the other hand, some lower class homosexuals with lesser reputations at stake may actually enjoy their experience in the all-male environment of jails or prisons to which they may be committed.¹³

A. *The Law in Other Countries*

The United States, the Soviet Union, and West Germany are the most notable of the countries in western civilization which severely punish private homosexuality between consenting adults.¹⁴ Such predominantly Roman Catholic countries as France, Italy, Mexico, and Uruguay do not include the conduct in their penal codes, nor do predominantly Protestant Denmark and Sweden or mixed Catholic and Protestant Switzerland.¹⁵ The British Parliament, acting upon the recommendation of the Wolfenden Report, eliminated the crime in 1967.¹⁶ Canada also struck the crime from its penal code in 1967¹⁷ under the leadership of its then Minister of Justice, Pierre Trudeau.¹⁸ In short, it is probably safe to say that western countries which severely repress homosexual behavior are in a diminishing minority.

B. *The Maryland Law*

At present, sections 553 and 554 of article 27 of the Maryland Code effectively prohibit homosexual conduct by mouth or by rectum in the following language:

11. See *Daniels v. State*, 237 Md. 71, 205 A.2d 295 (1964) (sodomy — eight year sentence); *Wampler v. Warden*, 231 Md. 639, 191 A.2d 594 (1963) (perverted practices — ten year sentence).

12. See *The Sun* (Baltimore), Apr. 20, 1966, § A, at 13, col. 3. The article reports the death by suicide of one of the eighteen men charged with perverted practices. The suicide occurred shortly after the incident.

13. See MD. ANN. CODE art. 38, §§ 1, 4 (1964).

14. C. ALLEN & C. BERG, *THE PROBLEM OF HOMOSEXUALITY* app. (1958).

15. MODEL PENAL CODE § 207.5(1), Comment (Tent. Draft No. 5, 1955).

16. 749 PARL. DEB., H.C. (5th ser.) 1403 (1967). See also *N.Y. Times*, July 5, 1967, § 1, at 1, col. 7; *The Times* (London), July 4, 1967, at 7, col. 7.

17. CAN. ANN. CRIM. CODE c. 51, § 149A(1)(b) (Tremear 1969). Buggery and acts of gross indecency with another person remain indictable offenses but are excepted under § 149 A (1) (a), (b) if committed in private between a husband and his wife, or any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act.

18. Trudeau stated "Are we going to put all sin in the criminal code? If so, it would be a pretty thick book. The state has no business in the nations bedrooms." *TIME*, Apr. 12, 1968, at 41. See also *TIME*, June 5, 1968, at 28.

Section 553. Sodomy generally.

Every person convicted of the crime of sodomy shall be sentenced to the penitentiary for not less than one year nor more than ten years.

Section 554. Unnatural or perverted sexual practices.

Every person who shall be convicted of taking into his or her mouth the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth of any other person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fined not more than one thousand dollars (\$1,000.00), or be imprisoned in jail or in the house of correction or in the penitentiary for a period not exceeding ten years, or shall be both fined and imprisoned within the limits above prescribed in the discretion of the court.

And in any indictment for the commission of any of the acts, hereby declared to be offenses, it shall not be necessary to set forth the particular unnatural or perverted sexual practice with the commission of which the defendant may be charged, nor to set forth the particular manner in which said unnatural or perverted sexual practice was committed, but it shall be sufficient if the indictment set forth that the defendant committed a certain unnatural and perverted sexual practice with a person or animal, as the case may be.¹⁹

Section 553 has been interpreted to refer to the common law crime of sodomy, by which presumably is meant buggery.²⁰ Section 554 is used chiefly with respect to oral contacts, but by its language "any other unnatural or perverted sexual practice" has been construed to have a broader scope.²¹ It might be interpreted to prohibit homosexual masturbation, but appellate authority to that effect is lacking. Similarly, while the words "every person" in both section 553 and section 554 and reference to "his or her mouth" and "his or her sexual organ" in section 554 indicate that lesbian activity is prohibited in Maryland, no reported appellate decision so holds.²²

II. THE SOCIAL PROBLEM OF HOMOSEXUALITY

The famous Kinsey Report²³ estimated in 1948 that four per cent of the adult white male population in the United States is exclusively homosexual for life after the onset of adolescence; ten per cent is more or less exclusively homosexual for at least three years between the

19. MD. ANN. CODE art. 27, §§ 553, 554 (1967).

20. See *Blake v. State*, 210 Md. 459, 124 A.2d 273 (1956).

21. *Id.*

22. Female prostitutes are frequently charged with soliciting perverted acts under MD. ANN. CODE art. 27, § 15(e) (1967).

23. A. KINSEY, W. POMERY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

ages of sixteen and fifty-five; thirty-seven per cent experience homosexual orgasm between adolescence and old age; and fifty per cent have some kind of homosexual contact by age fifty-five.²⁴ Even though the Kinsey statistics are more than twenty years old, to surmise that homosexuality is any less prevalent in the United States in 1970 than it was in 1948 would be mere conjecture.²⁵ Of the estimated fifty per cent who have some sort of homosexual contact by age fifty-five and the thirty-seven per cent who experience homosexual orgasm, undoubtedly a great many have their homosexual experiences during early adolescence,²⁶ a period in which psychiatrists believe homosexual interest is a normal phase of psychosexual maturation. Others have their experiences in the abnormally restricted all-male environment of a juvenile institution, jail, prison, mental institution, ship, or military installation. The remaining four per cent who are exclusively homosexual for life and the ten per cent who are more or less exclusively homosexual for a three year period are very much in the minority, but nevertheless number in the millions even if the Kinsey statistics are inflated. Applying the Kinsey statistics to Maryland and assuming that roughly five per cent of the adult male population is more or less exclusively homosexual at any one time, there may be as many as 100,000 practicing male homosexuals in Maryland.

A. Law Enforcement Problems

It has been estimated that six million homosexual acts are committed for every twenty convictions of sodomy, a ratio of 300,000 to one.²⁷ The validity of any estimate of behavior which is normally kept secret by all but a few of those performing it is naturally suspect. However, it cannot be disputed that the criminal law reaches only a small fraction of adult homosexuals, and an infinitesimal fraction of the number of illicit sexual acts they collectively perform annually. The Report of the State's Attorney for Baltimore City lists only thirty-one convictions for Sodomy and Perverted Practices during the January 1968 to January 1969 judicial term,²⁸ and thirty-three convictions for the same offenses during 1967.²⁹ These are to be compared with 478 convictions for robbery and 774 convictions for burglary, and 483 convictions for robbery and 891 convictions for burglary, during the

24. *Id.* at 650-51.

25. "... [M]ost experts think that the proportion of homosexuals in the U.S. adult population has not changed drastically since Kinsey did his survey, giving the country currently about 2,600,000 men and 1,400,000 women who are exclusively homosexual." *TIME*, Oct. 31, 1969, at 56; see also NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY, 4 (Oct. 10, 1969) [hereinafter cited as HOOKER REPORT].

26. Mutual masturbation is one frequent type of adolescent homosexual experimentation.

27. COMM. ON FORENSIC PSYCHIATRY OF THE GROUP FOR ADVANCEMENT OF PSYCHIATRY, REP. NO. 9. PSYCHIATRICALY DEVIATED SEX OFFENDERS 2 (1950).

28. [1968-1969] REPORT OF STATE'S ATTORNEY'S OFFICE OF BALTIMORE CITY, at 18-19.

29. [1967-1968] REPORT OF STATE'S ATTORNEY'S OFFICE OF BALTIMORE CITY, at 16-17.

1967-68 and the 1968-69 periods, respectively.³⁰ The number of robbers and burglars at large in Maryland during 1967-69 hardly compares with the approximately 100,000 homosexuals in the state, twenty to thirty per cent of whom probably performed prohibited sexual activities regularly in Baltimore City. Exact statistics on the number of homosexual soliciting cases which were handled as minor offenses in the Municipal Court of Baltimore City are not available, but persons familiar with the operations of that court indicate they represent only a small fraction of the criminal cases, probably less than 200 cases out of a total of 13,669 criminal convictions in the municipal court during the 1967-68 term.³¹ Statistics for the Maryland counties would undoubtedly be on an even smaller scale. Moreover, it is impossible to estimate how many of the convictions for sodomy and perverted practice which occur in Maryland annually relate to acts performed in public, in private with minors, or under circumstances involving compulsion.³²

Of course, comparison of convictions to the estimated number of criminal acts committed does not always tell the entire story about the effectiveness of a criminal law. A law which is ineffective in deterring persons who regularly commit a particular offense may theoretically be effective in deterring others who are tempted to commit the crime but have not yet done so. It is possible that much criminal law of doubtful efficacy remains on the books because of the theory that many people would start committing the prohibited acts if the criminal sanctions were removed or the severity of the penalty lessened. However, the assumption of deterrence usually rests upon the premise that the law will in fact be enforced. It is obvious that a criminal law, like the sodomy law, which is enforced against only a small percentage of those who regularly violate it and which can be evaded practically all of the time by those who choose to act privately and discreetly, has a minimal deterrent effect.³³ Latent homosexuals who refrain from acting out their homosexual impulses because of external pressure probably do so more in reaction to society's strong social and moral pressures against homosexual behavior than in fear of prosecution. The notion that much criminal sexual behavior would be unaffected by removal of the criminal prohibition is to some extent borne out by the experience in Denmark during World War II when the invading Germans deported the entire Danish police force leaving the criminal law without effective enforcement. Property crimes soared, but the

30. [1967-1968] REPORT OF STATE'S ATTORNEY'S OFFICE OF BALTIMORE CITY, at 16-17 & [1968-1969] REPORT OF STATE'S ATTORNEY'S OFFICE OF BALTIMORE CITY, at 18-19.

31. Conference with John Kolarik, Clerk of Municipal Court of Baltimore City, in Baltimore, May 1, 1970. See ADMINISTRATION OFFICE OF THE COURTS, ANNUAL REPORT 80 (1967-1968). Mr. Kolarik estimated that the central district, which handles most minor prostitution offenses, handles about two cases of soliciting by males per week.

32. Soliciting, of course, occurs in public, usually in a "gay bar," public lavatory, or on the street.

33. See Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, 159-62 (1967).

so-called "crimes of passion," including both sex crimes and murder, continued to be performed at about the same rate as before.³⁴

Further insight into the limited nature of the law enforcement effort against consenting adult homosexual offenders can be gained by considering the fact that the Vice Control Section of the Baltimore City Police Department numbers only forty-five men.³⁵ These men have responsibility for narcotics, gambling, prostitution, and other types of sex offenses in addition to cases of homosexual behavior. Complaints about forcible sodomy and molestation of minors may often be made by victims or their relatives, but private, consensual activity between adult homosexuals is rarely reported. Therefore, the decoy policeman in the big city Vice Control Section who flirts with homosexuals in their known hangouts and arrests for soliciting is virtually the only means of attempting to enforce criminal prohibitions against voluntary adult homosexual activities. City police departments properly devote most of their manpower resources to other areas of police work, and Vice Control Sections properly concern themselves more with offenders who inflict greater injury to the public, such as narcotics offenders and gambling offenders, the front line soldiers for organized crime, than with token efforts to decoy homosexuals. Smaller communities often do not even have separate Vice Control Sections and therefore efforts to decoy adult homosexuals probably are rare outside of Baltimore and the larger metropolitan counties of Maryland.

B. Community Reaction

Private adult homosexual conduct causes little or no harm to the community aside from the anxiety that homosexuals create among heterosexual citizens. Except in cases where adult homosexuals induce minors to practice homosexual acts with them,³⁶ there is little or no evidence that the presence of active adult homosexuals in our society influences anyone to become a homosexual. To the contrary, psychiatrists generally hold to the view that most of the psycho-sexual problems of which homosexual behavior is symptomatic have their origin in the home at a relatively early age.³⁷ The chief malefactors, if any, in the creation of a homosexual personality are the child's parents,³⁸

34. See Gardiner, *The Purposes of Criminal Punishment*, 21 MODERN L. REV. 117 (1958). The author said of the Danish experience: "This appears to confirm other evidence that greater certainty of detection and punishment *does* deter many potential offenders, but that where strong passions or deep psychological motives are involved, the prospect of detection and punishment have relatively little effect." *Id.* at 125.

35. This includes a captain, two lieutenants, six sergeants, thirty-three patrolmen and three policewomen. This information was obtained from a conference with Sergeant Eben of the Research Department of the Baltimore City Police Department on June 29, 1970.

36. See text accompanying notes 106-08.

37. See M. PLOSCOWE, *SEX AND THE LAW* 212 (1951).

38. *Id.* See also F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 104-05 (1961); J. DERIVER, *CRIME AND THE SEXUAL PSYCHOPATH* 86-88 (1958) ("Again it is the old story: the parents — in their relationships with, their attitudes toward their offsprings — are largely responsible for the molding and

not homosexual adults whom he may encounter later in his development. The placement of homosexuals in positions of great responsibility and sensitivity in government may endanger state secrets because such persons are regarded as unusually vulnerable to blackmail.³⁹ In the days before the population explosion when society had a great interest in human procreation it might have been arguable that repression of homosexuality was necessary to keep the human species multiplying. Arguments like the foregoing are made from time to time to buttress claims that homosexual behavior is socially harmful, but an increasingly sophisticated public is readily able to see that such arguments are obsolete or do not have general application.

It cannot be disputed, however, that homosexuals and their activities, including private activities which reach the public via rumor, create considerable anxiety in many citizens. Such anxiety is arguably a social harm of a sort which may justify efforts at control if homosexual activity can be controlled. Of particular importance is the fear that parents may have for their children because of the existence of homosexuals in the community. What is highly questionable, however, is the value of the criminal prohibition against private adult homosexuality in reducing such anxiety. The decoy policeman who causes the occasional adult homosexual to pay a fine or be sent to "Queen's Row" in the local jail probably does not perform a service to the anxious in assuring them that the homosexuals in the community are being rooted out or frightened into heterosexuality by vigorous police work. In the routine case, the matter never comes to the attention of the public. In the more rare case where a prominent public figure suddenly is exposed, the prosecution may create far more anxiety than it alleviates by calling attention to the fact that almost anyone may secretly be a homosexual. Thus, the successful police repression of homosexuality is just illusory.

Perhaps the best argument for repressing homosexuals and their behavior is that while such repression does not eliminate a social harm it performs a social good in assisting latent homosexuals to deny their homosexuality. Psychiatrists tell us that much of the hostility toward homosexuals in our society is a result of anxiety about the latent homosexuality which is present in greater or lesser degrees in all people.⁴⁰ Thus, among adolescent youths going through the so-called "homosexual stage" of psychosexual development, there is much behavior symptomatic of latent homosexuality, such as talk of "beating up queers"; hero worship of male sports figures, scoutmasters and schoolteachers; interest in penis comparisons; group masturbation; and, in a relatively high minority, fellatio and rectal intercourse. Homo-

formation of not only character or personality patterns in their children but sexual patterns as well"); Fine, *Psychoanalytic Theory of Sexuality*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 147, 158 (1965).

39. See M. PLOSCOWE, *SEX AND THE LAW* 195, 209-10 (1951). See also COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, *THE WOLFENDEN REPORT* 69-70 (1956). [hereinafter cited as WOLFENDEN REPORT].

40. See Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 5, 86-87 (1965).

males are often "rolled" by youthful gangs for their money and occasionally beaten without robbery.⁴¹ Manifestations of hostility to homosexuals, including overt violence, are simply a dramatic way of saying "I'm not one of those; I beat them up or talk conspicuously of beating them up; therefore I must be different." Such behavior is less common, but also manifest, among insecure adult males.⁴² Psychiatrists who hear talk against homosexuals that sounds too strong and lasts too long might well paraphrase Shakespeare's "The lady doth protest too much, methinks."⁴³ But if a large segment of male society feels this way — the Kinsey statistics indicating fifty per cent indulgence in homosexual behavior by age fifty-five suggest there is more basis for male sexual insecurity than mere psychiatric mumbo jumbo — perhaps repression of homosexual behavior serves the psychic needs of many insecure people. For such people, homosexuals are not really a problem, but rather an excuse for a type of masculinity posturing.

III. PSYCHIATRIC ATTITUDES TOWARD HOMOSEXUALITY

Homosexuality is not a recognized psychiatric disorder,⁴⁴ although psychiatrists often recognize homosexual behavior as symptomatic of emotional maladjustment. Under certain circumstances, homosexual behavior is regarded as more or less normal by psychiatrists. Examples of such behavior are experimental homosexual acts performed with peers during early adolescence⁴⁵ and the situational homosexuality of all-male institutions. In the former case, the individual engages in homosexual behavior only because he has not matured to the heterosexual inclinations which are normal at a later age. In the all-male society, like the prison, some individuals who would be heterosexual in a mixed society are temporarily homosexual because there are no heterosexual outlets for their sexual energy. Another example of homosexual behavior, which is not exactly normal but is also not necessarily indicative of a personality predisposed to homosexuality, is the adolescent homosexual male prostitute who is, at least in some cases, believed to perform homosexual acts primarily for money rather than for sexual gratification.⁴⁶

The great majority of Kinsey's four per cent who are exclusively homosexual during their adult lives, and many who are homosexual part of the time, would be regarded by most psychiatrists as emotionally dis-

41. See F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 29-31 (1961). See also WOLFENDEN REPORT 30.

42. See F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 29-30 (1961). See also Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 5, 117 (1965). To what extent such male insecurity is an underlying cause of harsh sodomy laws or harsh sentences for sodomy is an interesting, but unanswerable, question.

43. W. SHAKESPEARE, *HAMLET* ACT III Sc. 2.

44. See F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 30 (1961), which states that homosexuality is a "behavior symptom of a deep-seated and unresolved neurosis." See also J. DERIVER, *CRIME AND THE SEXUAL PSYCHOPATH* (1958).

45. See M. PLOSCOWE, *SEX AND THE LAW* 206 (1951).

46. See Butts, *Boy Prostitutes of the Metropolis*, 8 *J. CLINICAL PSYCHOPATHOLOGY* 673, 674 (1947).

turbed⁴⁷ or at least sexually immature people.⁴⁸ Most of the diagnoses of these persons would probably fall among the character disorders,⁴⁹ including sociopathy. However, there are schizophrenic homosexuals, alcoholic homosexuals, neurotic homosexuals, and senile homosexuals. In each case, homosexuality would be viewed by the psychiatrist as merely one facet of the patient's personality. Since the psychiatrist tries to look at the whole personality in attempting a diagnosis, he would probably regard a particular patient's homosexuality as only one symptom of his unique and individual pathology.

Whatever the precise psychiatric diagnosis of a particular homosexual, psychiatrists would be apt to describe him as guilt-ridden, masochistically inclined, and extremely lonely.⁵⁰ Whether the homosexual's guilt and loneliness cause his sexual maladjustment or whether his sexual maladjustment brings about social rejection from which guilt and loneliness follow is like asking whether the chicken precedes the egg. The two go together.

No one knows what would happen if society were to cease rejecting the homosexual. It is possible that he would be under less social stress and therefore less inclined to use homosexual deviancy as a defense mechanism.⁵¹ However, it cannot be stated with certainty that a different social treatment of the homosexual would change his behavior favorably or otherwise. There is a similar lack of evidence to support the proposition that less social rejection of homosexuals would result in increased homosexuality.

A. *Psychiatric Theories as to the Etiology of Homosexuality*

Since homosexuality is not regarded as a distinct psychiatric disorder, one would not expect psychiatrists to come up with a clear and simple explanation of how a homosexual personality is created. In fact, a wide variety of theories has been advanced. These include notions that homosexuality is merely normal sexual behavior arrested at an immature stage, that it is hereditary, that it is a defense against schizophrenia, that it is a defense against hidden but incapacitating fears of the opposite sex, or simply that it is a variant of "normal" sexual behavior.⁵² Whatever may be the correct theory concerning the etiology of homosexual behavior, the data upon which the psychologists and psychiatrists base their theories is apparently consistent. The

47. See F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 107 (1951). Psychiatrists, of course, usually see only those people who come to them seeking help for problems believed to be emotional disturbance. Psychiatric attitudes toward homosexuality may be based on a biased sample which excludes homosexuals who do not think they are sick.

48. See Knight, *Overt Male Homosexuality*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 434, 442, 445 (1965).

49. *Id.* at 460. See generally Fine, *Psychoanalytic Theory of Sexuality*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 147, 157-59 (1965).

50. See F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 107 (1951). See generally TIME, Oct. 31, 1969, at 64.

51. HOOKER REPORT 19-20. See also F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 35 (1951).

52. See Fine, *Psychoanalytic Theory of Sexuality*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 147, 158 (1965); WOLFENDEN REPORT 33.

overt homosexual almost always has a history of abnormal relationship during childhood with the parents or parent who raised him.⁵³ Many come from families in which the mother was dominant and the father absent or weak.⁵⁴ Often the homosexual's social history shows a childhood in which the boy competed with his father for his mother's affection and the mother openly and perhaps provocatively preferred the son to the father.⁵⁵ The near-universality of these abnormal parent-child relationships in the backgrounds of overt homosexuals indicates that the cause of their deviance is deep-rooted. It is not a simple lack of respect for society's rules or an absence of self-restraint against which criminal sanction is, according to the way the public seems to view the operation of the criminal law, an effective deterrent.

To say that overt homosexuality is often symptomatic of a serious personality disturbance having deep roots is not to conclude, as is commonly supposed, that homosexuals cannot control their behavior. Most homosexuals do not qualify to be excused for criminal acts under current definitions of that legal word of art, "insanity."⁵⁶ To say that a homosexual can at any given time resist the temptation to act out his sexual impulses is as different from inferring that he can continually refrain from homosexual behavior for life as it is to infer that a heterosexual can stay away from women for life because he can refrain from committing fornication or rape on any particular occasion. Most heterosexual males are capable of avoiding women, but it is unlikely that any law could restrain more than a minority of heterosexuals from indulging in heterosexual activities.⁵⁷ Fornication is widespread among unmarried heterosexuals in the many states which define it as criminal as well as in states like Maryland, which do not prohibit it.⁵⁸ The fact that overt homosexuals are often disturbed and maladjusted people probably makes it more difficult, if not impossible, for them to refrain from homosexual conduct than it is for unmarried heterosexuals to obey moral, social, and criminal prohibitions against pre-marital intercourse.⁵⁹

B. *Psychiatric Treatment as a "Cure" for Homosexuality*

Psychiatrists generally say that the prognosis is poor for exclusively homosexual individuals to become heterosexual.⁶⁰ Unfor-

53. See F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 105 (1961).

54. See J. DERIVER, *CRIME AND THE SEXUAL PSYCHOPATH* 85-86 (1958).

55. See Fine, *Psychoanalytic Theory of Sexuality*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 147, 158 (1965).

56. See Fisher, *The Legacy of Freud — A Dilemma for Handling Offenders in General and Sex Offenders in Particular*, 40 U. COLO. L. REV. 242, 249 (1968).

57. See M. PLOSCOWE, *SEX AND THE LAW* 213 (1951).

58. See Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 5, 10-11 (1965).

59. Of course, the fact that many heterosexuals and homosexuals believe that their sexual conduct is their own business, and not society's, coupled with the weakness of law enforcement, undoubtedly accounts for widespread violation of both fornication and sodomy statutes.

60. See Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW*, 5, 91 (1965). The likelihood of success-

tunately, there are a number of reasons why therapy for homosexuals would be impracticable, even if it were possible under ideal conditions.⁶¹ Foremost among these reasons are that the predominant methods of psychotherapy now available are prohibitively expensive for most homosexuals and most homosexuals are thought to be poorly motivated for psychotherapy.⁶² Most psychiatrists are probably sympathetic to liberalization of the sodomy laws,⁶³ perhaps because they see a basis in their practices for believing the Kinsey claims that fifty per cent of males have homosexual experiences during their lifetimes. Psychiatrists would probably rather have homosexuals come to them for treatment than go to prison. However, when pressed, they are unable to say that their science is an effective alternative to the criminal law in dealing with the social problems of homosexual behavior.⁶⁴ Rather, they would probably argue that private adult homosexuality ought no longer to be classified as a social problem. Instead, it should be considered only as the patient's personal problem and then only if the patient is disturbed by it.⁶⁵

IV. PROPOSALS FOR LAW REFORM

In the past fifteen years, several distinguished public and private commissions have made extensive studies of homosexuality and have recommended that social policy regarding homosexual conduct be changed. Dissenting as well as majority points of view are presented in several of the reports. Therefore, the reports are not only good sources of data about homosexual behavior and legal and social efforts to repress it, but also collectively present most of the arguments for and against changes in social and legal policy regarding homosexual conduct.

A. *The Wolfenden Report*

Perhaps most prominent among the studies is the "Wolfenden Report,"⁶⁶ prepared for the British Parliament by the "Committee on Homosexual Offenses and Prostitution," headed by Sir John Wolfenden. The Report was completed in 1957. It recommended by a vote of twelve to one "[t]hat homosexual behavior between consenting

ful psychotherapy is greater for bisexual than for exclusively homosexual individuals. See HOOKER REPORT where it is stated that a much higher percentage (perhaps fifty per cent) of predominantly homosexual persons having some heterosexual orientation and who present themselves for treatment can be helped to become predominately heterosexual (as compared to perhaps twenty per cent of exclusively homosexual persons).

61. See Fisher, *The Legacy of Freud — A Dilemma for Handling Offenders in General and Sex Offenders in Particular*, 40 U. COLO. L. REV. 242, 252-56 (1968), for a comprehensive discussion of the inadequacy of present treatment.

62. *Id.* at 255.

63. *Id.* at 251.

64. See O. MOWRER, *THE NEW GROUP THERAPY* (1964); See also Fisher, *The Legacy of Freud — A Dilemma for Handling Offenders in General and Sex Offenders in Particular*, 40 U. COLO. L. REV. 242, 256 (1968).

65. See note 42 *supra* and accompanying text.

66. WOLFENDEN REPORT note 36 *supra*.

adults in private should no longer be a criminal offense."⁶⁷ Twenty-one years of age was fixed as the commencement of adulthood. "Consent" and "in private" were to have the same definition with regard to homosexual conduct as with respect to heterosexual conduct.⁶⁸ However, the Wolfenden Report did not recommend that the crime of soliciting homosexual acts be removed from the arsenal of prostitution offenses.⁶⁹ The majority made it clear that the crucial argument which influenced them to recommend changing the law was that private sexual behavior between consenting adults is a matter of individual morality, not criminality. The Report stated:

Further, we feel bound to say this. We have outlined the arguments against a change in the law, and we recognize their weight. We believe, however, that they have been met by the counter-arguments we have already advanced. There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.⁷⁰

The Wolfenden recommendations concerning private, consensual adult homosexual behavior, initially rejected by the British Parliament,⁷¹ were enacted into law in 1967.

B. The Model Penal Code

A few years before the Wolfenden Commission began its study of homosexual offenses and prostitution, the American Law Institute commissioned a comprehensive study of the penal laws in the United States and development of a Model Penal Code.⁷² The Model Penal Code study, like the Wolfenden study, involved considerable investigation of the sociological data and theories relating to the various sociological problems which the criminal law is created to control and also

67. *Id.* at 48.

68. *Id.* at 48-49, 52.

69. *Id.* at 73.

70. *Id.* at 48.

71. See generally *N.Y. Times*, July 5, 1967, § 1, col. 7; *The Times (London)*, July 4, 1967, at 7, col. 7.

72. The first publication was issued in 1953 and the last in 1962. See MODEL PENAL CODE (Tent. Draft No. 1, 1953) & MODEL PENAL CODE (Proposed Official draft, 1962).

studied the existing law itself.⁷³ Lay and expert witnesses were interviewed and the relevant sociological, scientific, historical, and legal literature was reviewed and summarized in a commentary. A preliminary draft of the sex offender segment of the Model Penal Code was completed in 1955.⁷⁴ A Proposed Official Draft of the Model Penal Code, taking the same position with respect to private consensual adult homosexuality as the earlier Tentative Draft, was issued in 1962.⁷⁵

The Model Penal Code's position is a broader one than the Wolfenden recommendations, since all types of sex offenses were being analyzed. The following quotation from the Comments suggests the fact that private consensual sodomy between adults is a "victimless crime" was a primary reason for the proposal.

Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the following grounds. No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.⁷⁶

The Comment goes on to suggest that our legal tradition recognizes a fundamental right of privacy against interference in a citizen's personal affairs by government when he is not hurting others,⁷⁷ a concept which has recently been given recognition by the Supreme Court of the United States in cases involving private use of contraceptive devices⁷⁸ and private possession of pornographic materials⁷⁹ and by a lower federal court as a basis for ruling a Texas sodomy law unconstitutional.⁸⁰

The issuance of the Model Penal Code in 1962 has stimulated a number of state law revision projects, among them the revision of Maryland criminal laws by the Maryland Commission on Criminal Law. Most of these projects have yet to be completed. As mentioned

73. The Maryland Commission on Criminal Law has not commissioned special studies of sex offender and law enforcement practices in Maryland. It has been assumed that the findings of Wolfenden, American Law Institute and National Institute of Mental Health support generalizations about conditions in Maryland. Nevertheless, an effort was made to learn something of the particular Maryland situation. The author and Dr. Jonas Rappeport, Chairman of the Commission's subcommittee on sex and prostitution offenses, spent an evening discussing sex offender law issues, including the issue of prohibiting private voluntary homosexual relationships between consenting adults, with approximately thirty Maryland psychiatrists at a meeting of the Maryland Association of Practicing Psychiatrists early in 1968. The author also interviewed Captain William Kohler of the Vice Squad of the Baltimore City Police Department and Dr. Franklin Kameny, President of the Mattachine Society of Washington and himself both a homosexual and recognized expert on homosexuality, to learn about, respectively, enforcement of sex offender laws in Maryland and the attitudes of homosexuals with regard to the law.

74. MODEL PENAL CODE § 207.5 (Tent. Draft No. 4, 1955).

75. MODEL PENAL CODE §§ 213.2-213.4 (Proposed Official Draft, 1962).

76. MODEL PENAL CODE § 207.5(1), Comment (Tent. Draft No. 4, 1955).

77. *Id.*

78. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

79. *Stanley v. Georgia*, 394 U.S. 577 (1969).

80. *Buchanan v. Batchelor*, 38 U.S.L.W. 2609 (N.D. Tex., Apr. 30, 1970).

Delaware, Illinois⁸¹ and Connecticut⁸² are thus far the only states to have followed the Model Penal Code proposal regarding private adult homosexual behavior, although the revision of the New York Penal Law⁸³ represents something of a partial victory for the American Law Institute position. The New York Penal Law Revision Commission agreed with the Model Penal Code and proposed a draft which did not prohibit private homosexual acts between consenting adults.⁸⁴ However, the New York Legislature refused to accept the recommendation in its entirety and added to the proposed draft a special petty misdemeanor entitled "Consensual Sodomy,"⁸⁵ which in effect reduced the maximum jail penalty for private adult homosexual behavior from a ten year prison sentence to ninety days in jail.⁸⁶ It is to be expected that as additional state law revision commissions complete their work, more states will follow the Model Penal Code recommendations, if not by eliminating all of the so-called "victimless" sex crimes, at least by drastically reducing the penalties for such private behavior.

C. *The Hooker Report*

The most recent report is that of a Task Force on Homosexuality⁸⁷ appointed by the National Institute of Mental Health in 1967. Dr. Evelyn Hooker of the University of California, Los Angeles, chaired the task force. The report makes two principal recommendations concerning the social and mental health problems of homosexuality. First, the Task Force unanimously recommends the establishment of a Center for the Study of Sexual Behavior,⁸⁸ conceding by implication that much remains to be learned about the problems the Task Force undertook to study. Second, the Task Force, by a vote of eleven to three recommended changes in social policy including not only changes in the criminal law but also changes in practices of discriminating against homosexuals in employment, government security classification, and social acceptance.⁸⁹ The three dissenting members explained their refusal to recommend changes in social policy on the ground that such a recommendation would be premature until further study had been undertaken, presumably by the proposed Center for the Study of Sexual Behavior.⁹⁰

Unlike the Wolfenden Report and the American Law Institute's Model Penal Code, the Hooker Report's position seems to be grounded more upon a concern for the mental health of the large number of persons affected by homosexuality than upon a philosophical attitude that private sexual behavior between consenting adults is beyond the proper scope of the criminal law. The Report states:

81. See note 7 *supra*.

82. See note 8 *supra*.

83. See note 10 *supra* and accompanying text.

84. N.Y. REVISED PENAL CODE, art. 130 (Official Draft 1965).

85. N.Y. PENAL LAW § 130.38 (McKinney 1967).

86. N.Y. PENAL LAW § 70.15(2) (McKinney 1967).

87. HOOKER REPORT note 24 *supra*.

88. *Id.* at 5.

89. *Id.* at 16-21.

90. *Id.* at 2.

Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than as a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives. The existence of legal penalties relating to homosexual acts means that the mental health problems of homosexuals are exacerbated by the need for concealment and the emotional stresses arising from this need and from the opprobrium of being in violation of the law. On the other hand, there is no evidence suggesting that legal penalties are effective in preventing or reducing the incidence of homosexual acts in private between consenting adults. . . .

We believe that [a change in the law] would reduce the emotional stresses upon the parties involved and thereby contribute to an improvement in their mental health. Furthermore, such a change in the law would also encourage revisions in certain governmental regulations which now make homosexual acts a bar to employment or a cause for dismissal. By helping thereby to remove a source of anxiety over being discovered, this would make an indirect contribution to the mental health of the homosexual population.⁹¹

D. *Summary of Arguments For and Against a Change in the Law*

The three studies discussed above raised many salient arguments which reveal a need to change the present law regarding consensual adult homosexual behavior in private. Summarized, they are:

1. The law should make no effort to interfere in the purely private relations of adults unless consent is legally or factually absent.
2. The secular community is not harmed by such private conduct.
3. The penal law is unenforceable against such private conduct.
4. Maintaining an unenforceable law brings the law into disrepute.
5. Capricious enforcement of the law is inequitable.
6. The law creates opportunities for bribery and extortion.
7. Incarceration in the all-male and situationally homosexual environment of a prison or jail is unsuitable and may even aggravate the individual's sexual maladjustment.
8. Requiring police to enforce the law against private, adult, consensual, homosexual behavior places a strain on over-taxed police resources and creates police force morale problems.⁹²

91. *Id.* at 18-20.

92. Policemen who are required to decoy homosexuals by flirting with them or to spy on public lavatory stalls through peepholes resent such duty.

9. Laws affecting what is essentially private and personal morality constitute a secular invasion of an area which is exclusively the province of spiritual authorities.

10. Homosexuals are inhibited by the criminal law from seeking psychiatric help for their emotional problems.

11. The law inhibits homosexuals with venereal disease from seeking medical attention.

In contrast, the following arguments against law change were collectively the bases for the dissents to the recommendations of the Wolfenden and American Law Institute Reports.

1. Homosexuality, wherever, however, and by whomever committed, is a cause or symptom of moral decay in society and should be repressed by law.⁹³

2. The sanction of the law is, at present, the main motive which influences homosexuals to consult medical advisors. Said motive would be negated if the law were removed.

3. Policemen prevent homosexual misconduct by their presence even though few actual arrests are made. Removal of the law would remove this deterrent to undesirable conduct.

4. Removal of the law will deprive young adult employees in professions and occupations where homosexual practices are notoriously common, such as the theatrical profession, of a defense against a corrupt approach by superiors and elders.

5. Medical science has not advanced far enough so that treatment a reasonable alternative for punishment. The law must do the best it can, and at present it is better to punish than to treat.

6. Relaxation of our moral standards by apparently condoning homosexuality encourages a process of relaxing moral standards generally, which is all too prevalent today.

7. Licensing homosexual behavior in private may lead to more public display of evidence of such activity, such as a more obvious presence of homosexual bars and magazines and men walking arm-in-arm on the street.

8. Condoning homosexual activity between adults will result in the corruption of more youths, either because the homosexuality of

93. As Mr. Adair, expressing reservations to the Wolfenden Committee's recommendation, put it:

Many citizens, it must be admitted, regard the prohibitions expressly imposed by law as the utmost limits set to their activities and are prepared to take full advantage of any omission or relaxation. It would be surprising if there are not considerable numbers with this philosophy among those with whom we are concerned in this inquiry, and the removal of the present prohibition from the criminal code will be regarded as condoning or licensing licentiousness, and will open up for such people a new field of permitted conduct with unwholesome and distasteful implications.

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persons whom youths might admire will not be suppressed or because lifting restraints on adult activity would also further whet the appetites of adults for activity with youths.

9. Society has a right to express its disgust with respect to homosexual behavior by law even though such behavior cannot effectively be prevented.

It was in light of these considerations that the Maryland Commission on Criminal Law drafted the proposed sex offender code for Maryland.

V. THE MARYLAND COMMISSION'S PROPOSED DRAFT

In attempting to evaluate and revise the provisions of the Maryland Criminal Code relating to sex and prostitution offenses, the Maryland Commission on Criminal Law was required to deal with many more issues than the simple question of whether or not homosexual conduct between consenting adults in private ought to be prohibited. The proposed drafts of the Sex Offender and Prostitution Codes do much more than eliminate such conduct from the substantive definition of sodomy offenses. In the main, they attempt to clarify and simplify the existing law. However, the Sex Offender Code also creates several degrees of sodomy which have the effect of increasing the seriousness of the penalty for certain kinds of homosexual conduct in relation to other kinds of homosexual conduct and to other crimes generally. Thus, the Commission draft treats homosexual buggery and fellatio committed by force or with a minor victim equally as offensive to a victim and society as rape, and provides an equivalent penalty. Sodomy in the first degree,⁹⁴ like rape in the first degree,⁹⁵ covers cases where nonconsensual homosexual behavior is accompanied by aggravating factors, such as the victim's extreme youth (under thirteen years) or the fact that the actor is a stranger, employs a deadly weapon, or inflicts suffocation, strangulation, severe pain, or serious physical injuries, or commits the crime in gang fashion. Second degree sodomy⁹⁶ covers less aggravated cases of nonconsensual sodomy, including homosexual behavior between an adult more than four years older than a minor victim who is eighteen years old or less and conduct where the actor takes advantage of a victim who is mentally defective, mentally incapacitated, or physically helpless.⁹⁷

The Proposed Draft of the Prostitution Code prohibits a wide variety of acts which might be called homosexual prostitution,⁹⁸ including soliciting homosexual conduct for money or other compensa-

94. MARYLAND COMM'N ON CRIMINAL LAW, PROPOSED SEX OFFENDER CODE § 130.35 (Sept. 11, 1969).

95. *Id.* at § 130.25.

96. *Id.* at § 130.30.

97. *Id.* at § 130.30(b), (c).

98. MARYLAND COMM'N ON CRIMINAL LAW, PROPOSED PROSTITUTION CODE § 230.10 (1) (Sept. 12, 1969).

tion,⁹⁹ living off the earnings of a homosexual prostitute,¹⁰⁰ procuring or transporting for homosexual prostitution purposes, and maintaining a house of prostitution.¹⁰¹ The draft does not prohibit soliciting for homosexual behavior where homosexual conduct for hire is not involved. Instead, it is contemplated that another portion of the proposed new criminal code will prohibit such soliciting in public when it amounts to an annoyance or public nuisance. A section of the proposed prostitution code, entitled "Keeping a Bawdy House," also outlaws homosexual "steam baths" and other nuisance-type operations where regular gatherings of homosexuals to engage in homosexual behavior may offend the community, even though it may not be possible to prove that homosexual behavior for hire is transacted therein.¹⁰²

If enacted the effect of the Proposed Prostitution Code would be to make stronger and more inclusive the prohibitions of homosexual prostitution and related activities with one significant exception. While it undoubtedly would still be a crime to annoy a stranger on the street by soliciting homosexual behavior, it would no longer be criminal to solicit the decoy policeman as he encourages the solicitation and therefore could not reasonably claim a nuisance-type affront. This would change the nature of the crime of solicitation of free homosexual favors from a sex or prostitution offense to a disorderly conduct or a public nuisance-type crime where the essence of the wrong is that a citizen victim or the community is offended. In short, soliciting homosexual behavior would no longer be an offense where it is "victimless."

Reading all of its sections together, the proposed new criminal code *would* prohibit all the following types of homosexual activity:

1. Nonconsensual activity;
2. Activity between an adult and a minor four years younger than the actor;
3. Virtually any kind of activity which supports homosexual prostitution;
4. Public nuisance-type homosexual activity, including offensive solicitation and indecent behavior in public; and
5. Operating homosexual "steam baths" and other offensive places where homosexuals regularly gather to commit homosexual acts.

The proposed new criminal code *would not* prohibit:

1. Homosexual activity between two consenting adults in private or between a person who has recently passed into adulthood and a minor near to him in age under conditions of consent and privacy;
2. Soliciting a decoy policeman to commit a homosexual act without mention of money or other compensation.

99. *Id.* at § 230.00.

100. *Id.* at § 230.00 (A)(3).

101. *Id.* at § 230.00 (A)(2).

102. *Id.* at §§ 230.00 (A)(5), 230.45.

VI. LAW ENFORCEMENT ADVANTAGES OF THE PROPOSED SCHEME

In deciding to recommend elimination of prohibitions against atypical sexual behavior from the proposed new code, the members of the Maryland Commission undoubtedly were influenced by the reasoning of the majorities in the Wolfenden and American Law Institute studies. However, the Commission was augmented by an additional argument, not mentioned in the Wolfenden and Model Penal Code commentaries, which ought to put the issue into a light even more favorable to law reform. The argument, inspired by a recommendation of the President's Commission¹⁰³ that the police be regarded as an administrative agency, holds that police enforcement of the sodomy laws against the homosexuals who pose the greatest threat to society, those who molest minors, would actually be more effective if the law did not instruct police to concern themselves with the impossible task of trying to control *all* homosexual behavior.

There can be little doubt that the homosexual behavior which is of the greatest concern to society is behavior between an adult and a minor. According to psychiatrists, there is probably little chance that either of two consenting adults who engage in homosexual behavior together will "corrupt" the other in the sense of converting a person with heterosexual tendencies into a homosexual.¹⁰⁴ Sexual inclinations are apparently well established by the time adulthood is reached. On the other hand, there is some chance that a boy who is enticed into homosexual behavior by the money or other persuasion of an adult might be influenced by the experience in a way damaging to his psychosexual maturation. The youth would not necessarily have to become a homosexual¹⁰⁵ thereafter to suffer psychic injury from the experience. Such injury might take the form of confusion, selfdoubts, guilt feelings, or anxieties which could be very distressing to the adolescent and perhaps permanently harmful to his personality development.¹⁰⁶ For these reasons, the youthful partner of the adult homosexual may truly be a victim.

The present law of sodomy¹⁰⁷ and perverted practices¹⁰⁸ in Maryland of course prohibits homosexual behavior between an adult and a minor, although it makes no differentiation between the adult-adult and adult-minor acts in specifying penalties. However, in practical effect, the broad scope of the present law diverts limited police resources *away* from the problem of youthful molestation. Thus, the

103. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 18 (1967).

104. This opinion was expressed to the author by Jonas Rapoport, M.D., Chief Medical Officer for the Supreme Bench of Baltimore and Assistant Professor of Psychiatry at the University of Maryland and Johns Hopkins Schools of Medicine.

105. Fear that homosexual experience will make a youth homosexual is probably the greatest concern of parents who may turn out to be among the most militant citizens when the issue is debated by the legislature.

106. See M. PLOSCOWE, SEX AND THE LAW 213-14 (1951). *But cf.* Fine, *Psychoanalytic Theory of Sexuality*, in R. SLOVENKO, SEXUAL BEHAVIOR AND THE LAW 147, 163 (1965).

107. MD. ANN. CODE art. 27, § 553 (1967).

108. MD. ANN. CODE art 27, § 554 (1967).

105 - What a great quote! Their greatest fear is an angry man!

^{Decoy} by policeman who arrests an adult homosexual for soliciting invariably arrests a defendant who is trying to engage in homosexual behavior with *another adult* (i.e., the policeman), not with a juvenile. The efforts of that policeman are diverted away from the problem of molestation of youth.

The deterrent effect of the law as to conduct between adults and minors is also dissipated when the consequences of adult-minor behavior are the same as for adult-adult behavior. If adult-adult acts were permitted when performed discreetly and the penalty for adult-minor behavior were severe, surely most adult homosexuals would be more motivated to confine their activities to other adults. In effect, minors would be made "jailbait" by the statute, much as statutory rape laws¹⁰⁹ have made minor girls "jail bait" for adult heterosexuals. No doubt, if the law were changed, some adult homosexuals would continue to molest minors, just as some adult heterosexuals now commit the crime of statutory rape. However, any adult homosexual attentions which could be diverted from minors to adults could only accrue to the benefit of the minors.

The extent to which law change would influence adult homosexuals is difficult to predict. It would only be logical to expect many to shun contacts with minors if there were no risk of prosecution in performing homosexual acts between adults and a stiff penalty backed by effective enforcement for such behavior with minors. A mere lessening of the penalty for adult-adult relationships would probably not be as effective in channeling adult homosexual attentions away from minors, since disclosure, not jail, is the aspect of criminal prosecution for sodomy that many homosexuals fear most.

One of the principal occasions for homosexual conduct between ^{adults} adults and minors is the practice of homosexual prostitution, in which the adult usually pays the minor to accept fellatio.¹¹⁰ Such conduct is often centered in specific localities of general notoriety, such as Times Square in New York City and Mount Vernon Place in Baltimore. If police energies that are now being expended on decoying adults who are willing to engage in homosexual behavior with adults were diverted to more intensive surveillance of localities notorious for homosexual prostitution, enforcement of the crime of "statutory sodomy" against the customers of youthful homosexual prostitutes might have a significant effect in controlling adult-minor homosexual activity. However, as long as society demands token enforcement of the sodomy laws against all homosexuals, such police resources will continue to be diluted in efforts to catch relatively less important offenders.

CONCLUSIONS

Prohibitions against homosexual behavior between consenting adults in private are not only unenforced, they are unenforceable. Extensive studies by the Wolfenden Commission, the American Law

109. *E.g.*, MD. ANN. CODE art. 27, § 462 (1959).

110. *See* M. PLOSCOWE, SEX AND THE LAW 204 (1951).

Institute and the National Institute of Mental Health have recommended removing such conduct from the list of types of homosexual behavior defined by law as criminal. The trend beginning in other jurisdictions is to follow these recommendations. The science of psychiatry does not yet provide a "cure" for homosexuality which might be offered as an alternative to punishment. It does, though, suggest a number of reasons why permitting homosexual behavior between consenting adults in private is not likely to increase the number of adults with homosexual tendencies, and why prohibition and token punishment of such conduct is unlikely to correct the deep-rooted emotional maladjustment which produces homosexual acts. Most recommendations for law change, including those of the Maryland Commission on Criminal Law, stress the inappropriateness and futility of attempts to outlaw sin and would limit definitions of sex crimes on philosophical grounds to behavior which directly harms an individual victim or publicly offends the community. However, a modern approach to crime definition, recommended by the President's Commission on Law Enforcement and Administration of Justice, would also take into account the fact that the police are really an administrative agency created to protect the public and that definitions of crime serve as operating instructions for the police. It is wasteful of public resources to direct the police to try to suppress private, voluntary homosexual behavior between adults, particularly when the much more serious problem of adult-minor relationships is deserving of additional police attention. Indeed, the principal police technique for arresting adults who are inclined to commit private consenting homosexual acts with other adults, the decoy policeman, is selective in favor of adults who may not have tendencies to molest minors. Moreover, permitting private voluntary adult-adult homosexual relationships while imposing severe penalties, *backed by more effective enforcement*, upon adults who prefer minors should make minors "jail-bait" and channel the homosexual activities of at least some adult homosexuals away from them.

For the foregoing reasons, the following provisions embodied in the draft sex offender code currently approved by the Maryland Commission on Criminal Law should be adopted:

1. The Sodomy and Perverted Practice crimes should be redefined so that private consensual homosexual behavior between adults is no longer prohibited and those crimes cover only acts of "homosexual rape," where consent is actually lacking, and "homosexual statutory rape" where consent is deemed lacking because of the youth of the minor victim.

2. The prostitution offense of soliciting should be redefined to exclude from prohibition solicitation of a decoy policeman where no offer to engage in homosexual behavior for hire is involved. Instead, the solicitation of free homosexual favors should be criminal only where it actually constitutes a nuisance or disorderly conduct-type annoyance to a civilian victim in a public place. Homosexual prosti-

tion for hire and supporting activities, as well as operation of "steam baths" and other facilities for the regular performance of homosexual acts by groups of homosexuals¹¹¹ should continue to be prohibited because group or professional homosexual conduct creates greater dangers of transmitting venereal disease and constitutes a greater public nuisance against which law enforcement efforts are more capable of being effective.

111. As drafted, the "steam bath provision," § 230.45, entitled "Keeping a bawdy house," would penalize one who operates or assists in the operation of a place where three or more persons not married to one another regularly gather to engage in sexual conduct if such operator or assistant purposely facilitated the use of the premises for such sexual conduct. The provision would not penalize the operator of, for example, a YMCA facility used by homosexuals if he did not encourage homosexuality in the facility. Likewise, it would not punish the operator of the usual "gay bar" where homosexuals rendezvous but go elsewhere to engage in homosexual conduct. It would punish the operator of a homosexual "steam bath" whose establishment makes a point of providing a place where homosexual conduct can take place as well as the motel owner who purposefully invites unmarried couples to use his place for fornication. The provision requires affirmative encouragement on the part of the defendant to be operative as well as proof that he acted with purpose. Merely failing to take steps to prevent his establishment from being used for sexual purposes would not be enough to convict.