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Criminal Law: An Examination of the Oklahoma Laws Concerning Sexual Behavior

In Oklahoma today, the only sexual activity which is permissible over the entire state is penile-vaginal intercourse between persons married to each other.[1] All other activity has been proscribed, either by statute or court interpretation. Punishment for violation of these laws is severe.[2]

These prohibitions and penalties would clearly be within the province of the state's duty to protect its citizens, except that these laws can be and often are applied to private consensual behavior in which no one is harmed.[3] According to Kinsey, over 95 per cent of the male population have violated these laws.[4]

Since the existence of these laws makes potential criminals of most of the population, in the past decade many legal writers have urged reform.[5] After extensive consideration of the problems, the Model Penal Code, the Wolfenden Report in England, and the 1964 International Congress on Criminal Law of the Association Internationale de Droit Penal all concluded that private consensual behavior, even if sexual should be of no concern to the state.[6] The legislatures of Illinois,[7] Connecticut,[8] and to a lesser degree New York[9] have incorporated this philosophy into their new penal codes.

Under this philosophy, the removal of the state from the realm of private consensual sexual behavior is justified by the belief that statutes regulating sexual behavior reach beyond the necessary protection of society from harm and intrude

[1] While Oklahoma has no fornication statute, many communities have enacted local prohibitions. However, these will not be discussed because information concerning the nature and extent of their enforcement is difficult to ascertain.

[2] The Oklahoma laws and punishments are similar to those in most American jurisdictions. Recently, the Supreme Court of Indiana affirmed a conviction and sentence of up to fifteen years for copulation with a chicken. *Murray v. State*, 236 Ind. 688, 143 N.E.2d 290 (1957). The court's opinion is notable for its singular preoccupation with the question of whether a chicken is a beast within the meaning of their "crime against nature" statute. The severity of the sentence is not discussed.

[3] *Harris v. State*, 457 P.2d 638, 644 (Alaska 1969).

[4] A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 592 (1948).

[5] Probably no area of individual behavior has received more attention from legal writers and less from lawmakers.

[6] Most European countries have already reached such a conclusion. Belgium, Denmark, France, Greece, Italy, Netherlands, Spain, and Sweden do not punish homosexual activity between consenting adults in private. *See*, Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 654 n. 35 (1966).

[7] ILL. REV. STAT. ch. 38 § 11-2, 3, 7, 11 (1963).

[8] Even though the governor signed the legislation in July 1969, it does not become effective until October, 1971.

[9] N.Y. REV. PENAL LAW § 130 (McKinney 1965).

upon individual freedom.[10] Rights of individuals[11] should only be restricted to the extent necessary to allow members of the community "to go about their lawful pursuit without fear of attack, plunder, or other harms."[12]

What the lawmaking groups appear to be seeking by means of morals legislation is not security for the community but restraint of conduct that is regarded by others as offensive.[13] When passed, these laws were an attempt by that society to enforce a code of conduct prescribing private morality. In view of this, can their retention in today's society be justified? Three possible justifications have been suggested for retention of these laws.

Lord Devlin proposes a philosophical justification[14] which assumes that morality is basic to any system of society and law. He argues that society decides what forms of immorality are acceptable or unacceptable, and has the right to punish what it considers wrong even if it is in error about what is wrong. When society feels itself injured and reacts to some form of conduct with indignation, disgust, or intolerance, it has the right and power to take action that will punish, deter, or reform the offender. Consequently, "it is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a creed and its associated sensitivities, however irrational, in deference to a minority's skepticism."[15]

A second justification is suggested in a reservation to the Wolfenden Report. The majority of our citizens recognize clearly the moral force of the criminal law. However, many citizens regard the prohibitions expressly imposed by the law as the utmost limits set to their activities and are prepared to take full advantage of any omission or relaxation. Therefore, it would be surprising if there are not considerable numbers who follow this philosophy and the removal of the present prohibitions from the criminal code will be regarded by them as condoning or licensing licentiousness and opening up a new field of permitted conduct with unwholesome and distasteful implications.[16]

A third justification for retaining the existing laws is that even though

[10] Harris v. State, 457 P.2d 638, 644 (Alaska 1969). This argument to a large extent reflects one of the basic doctrinal tenets of John Stuart Mill, who stated: "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."

[11] These rights might flow from a "right to privacy" found as one of the penumbral emanations of the Bill of Rights and the fourteenth amendment due process clause, or simply as one of the unenumerated rights guaranteed by the ninth amendment. *See* Goldberg, J., concurring in Griswold v. Connecticut, 381 U.S. 479, 493, 85 S.Ct. 1678, 1686, 14 L.Ed.2d 510, 520 (1965).

[12] Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

[13] *Id.* at 670.

[14] R. DEVLIN, THE ENFORCEMENT OF MORALS (1959).

[15] Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 671 (1963).

[16] *See* Adair's Reservation in the Committee on Homosexual Offenses and Prostitution at 195 (Authorized American Edition 1963).

these laws are on the books and could be enforced against the majority, in practice their enforcement is against only those individuals who show lack of judgment by committing these acts publicly or with force. As a result, the apparently wide gap between our sex laws and actual enforcement does not exist. One writer argues:

> True, the vestiges of yesteryear remain on the books. But while the law on the books may not keep pace with scientific knowledge or community mores, the law as enforced or interpreted by the police, the district attorney, and the court, in fact, corresponds with an apparently high degree of fidelity to the wishes of the public.[17]

The validity of these justifications for continuing to carry these statutes can be ascertained by looking at the Oklahoma cases involving adult private consensual sexual crimes. More specifically, these crimes are adultery, statutory rape, incest, and the crime against nature. Prostitution will not be discussed because it is distinguishable from those cases of mutual sexual gratification and in addition entails different problems of law enforcement.

Adultery

While the commission of adultery is made criminal in Oklahoma,[18] the statute seems to recognize to a certain extent that this is one of those areas which is in the blunt words of the Wolfenden Committee "not the law's business."[19] Oklahoma is one of the eight American states[20] where prosecution may be instituted only upon complaint of the injured spouse, unless the conduct of the offending parties is "open and notorious." The Oklahoma court has emphasized that conduct which falls short of being open and notorious is not a crime against the state but is a "private wrong,"[21] "a personal offense against the injured wife or husband."[22] It is so much in the nature of a private wrong that if the prosecuting spouse has a change of heart, even after the action has been commenced, dismissal is mandatory.[23]

[17] Slovenko, *Sex Mores and the Enforcement of the Law on Sex Crimes: A Study of the Status Quo*, 15 KAN. L. REV. 265, 270 (1967). *See also* OLIVER, SEXUAL DEVIATION IN AMERICAN SOCIETY 110 (1967).

[18] 21 OKLA. STAT. § 871 (1961) provides: "Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife as the case may be, or by the husband or wife of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery."

[19] Committee on Homosexual Offenses and Prostitution n.16 at 48.

[20] The others are: Ariz., La., Mich., Minn., N.D., Ore., and Wash.

[21] Lee v. State, 28 Okla. Cr. 397, 402, 231 P. 324, 326 (1924).

[22] Copeland v. State, 10 Okla. Cr. 1, 3, 133 P. 358 (1913).

[23] *Ex Parte* Lawrence, 39 Okla. Cr. 360, 335 P. 1101 (1925). The converse, however, is not true; it is error to refuse to dismiss if the only objection is that of the offended spouse. Parry v. State, 84 Okla. Cr. 311, 181 P.2d 330 (1947).

Consequently, in those actions not commenced by a spouse the crime consists not of committing adultery, perhaps not even of committing adultery indiscreetly, but of committing adultery in a manner which has

> something aggressive and defiant in its nature, which fears not to flaunt its lecherous colors in the light of day and the frowning face of public reprobation[24]

and evidence sufficient only to prove the adulterous acts even where habitual and continuous is insufficient to sustain a conviction under the statute. Thus, in *Gill v. State*[25] the court, while noting that the evidence reasonably proved commission of adultery, reversed the conviction because the parties had claimed to be married and there was no evidence that they were not believed. And in *Copeland v. State*[26] the court in reversing the conviction of adultery found error in the refusal of the trial court to instruct the jury that they must find the defendant not guilty even though one of those acts had been witnessed by a third person if the defendant had attempted to insure that his conduct was secret.

No American jurisdiction exacts a sterner penalty for adultery than the five-year maximum sentence prescribed by the Oklahoma statute.[27] In the majority of American states the commission of adultery is merely a misdemeanor,[28] and in several states is not made criminal.[29] The harshness of the penalty in Oklahoma, however, cannot be taken as any real indicator of public concern, because Oklahoma's adultery statute is, like those of other states, essentially dead letter law. Since 1942, only two convictions for adultery have been appealed to the court of criminal appeals and only one affirmed.[30] The court has likewise affirmed few convictions for open and notorious adultery, the latest being decided in 1913.[31]

[24] Barber v. State 15 Okla. Cr. 588, 595, 179 P. 790, 792 (1919), citing State v. Sekrit 130 Mo. 401, 406, 32 S.W. 977, 978 (1895) with approval.

[25] 32 Okla. Cr. 279, 240 P. 1073 (1925) is criticized in Comment, 14 OKLA. L. REV. 203, 205 (1961) which discusses the present difficulty of proof under section 871 and recommends that the legislature alleviate this difficulty so that the state can more effectively prosecute adulterors.

[26] 10 Okla. Cr. 1, 133 P. 258 (1913).

[27] 21 OKLA. STAT. § 871 (1961).

[28] Foster & Freed, *Offenses Against the Family*, 32 U.M.K.C. L. REV. 33, 94 (1964).

[29] The commission of adultry is not a crime in Ark., La., Nev., N.M., and Tenn.

[30] *Reversed*, Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947); *Aff'd*, Dale v. State, 449 P.2d 921 (1969). The *Dale* case involved the pool hall seduction of a newly-married 18-year-old caucasian by a black man who was subsequently sentenced to seven years for adultery following a former felony conviction. It appears from the facts in the case that the defendant should have been charged with rape because of the mental capacity of the victim.

[31] Spencer v. State, 14 Okla. Cr. 178, 169 P. 270, (1918). In this case the couple had lived together claiming to be man and wife before it was learned by the community that this was not the case. After a warning by the county attorney they continued to live together leading to the defendant's arrest. Harris v. State, 11 Okla. Cr. 270, 145 P. 759 (1915), where the woman involved was a stepdaughter of the defendant. Mitchel v. State, 10 Okla. Cr. 697, 140 P. 622 (1914), and Kitchens v. State, 10 Okla. Cr. 603, 140 P. 619 (1914) which arose out of the same adulterous relationship.

If the greatest harm done by such dead letter laws was the cluttering of the statute books with quaint relics of legal history, their reform would merit little concern. But, in fact, their spectre too often returns in the form of discriminatory enforcement and vehicles for blackmail.[32] Recognizing the potential for blackmail the Oklahoma court has said that "in no other class of litigation is the opportunity for blackmail already so great."[33]

Suits filed by temporarily grieved or calculating spouses can also be a time consuming nuisance for the district attorney's office, since such suits are subject to mandatory dismissal upon the complaining spouse's signing an affidavit condoning the adultery,[34] or when a reconciliation has been made or a satisfactory divorce settlement reached.[35]

The drafters of the Model Penal Code included no section making adultery a crime. The interest in protecting public decency from flagrant affront, which our "open and notorious" provision fails to do because of difficulties of proof, is satisfied by section 251.1 which makes open lewdness a misdemeanor.[36] The drafting committee of the new New York penal code also recommended that no article on adultery be included.[37] In the face of this recommendation the legislature chose to retain the criminal sanctions against adultery in New York, an act which Professor Ploscowe calls "a monument to the inability of legislators to think rationally about sex crimes."[38]

It is hoped that Oklahoma, which unlike the great majority of American states has never had a fornication statute and which chose to limit its prosecution for ordinary adultery to actions instituted by a spouse, will take one further step by recognizing that the small utility of the statute is outweighed by what the Oklahoma court has called its "immense possibilities for those who are evilly disposed"[39] and relegate what it has made "a private wrong" to the realm of private law.

[32] MODEL PENAL CODE § 207.1 Comments (Tent. Draft No. 4, 1955).

[33] Perry v. State, 84 Okla. Cr. 211, 223, 181 P.2d 380, 386 (1947).

[34] Taylor v. State, 29 Okla. Cr. 160, 232 P. 963 (1925).

[35] MODEL PENAL CODE § 207.1 Comments (Tent. Draft No. 4, 1955).

[36] This section is analogous to 21 OKLA. STAT. § 22 (1961) which makes "outraging public decency" a misdemeanor.

[37] In addition the 1964 International Congress on Criminal Law of the Association Internationale de Droit Penal passed this resolution:

> Adultery is only too frequently a factor in the disruption of families. Nevertheless, penal sanctions have proven to be ineffective in controlling this threat to family life. Such sanctions should be eliminated from the penal law. Adultery should be dealt with by civil courts in connection with divorces and separation actions and other types of matrimonial proceedings. Social, religious and educational organizations, with their more personal control over human behavior can be more effective in dealing with adultery than the penal law.

Ploscowe, *Report to the Hague*, 50 CORNELL L. Q. 425, 431 (1965).

[38] Ploscowe, *Sex Offenses in the New Penal Law*, 32 BROOKLYN L. REV. 274, 284 (1966).

[39] Perry v. State, 84 Okla. Cr. 211, 223, 181 P.2d 380, 386 (1947).

Statutory Rape

It is ironic that a society which in its social attitudes seems to place the onus of chastity among its youth upon the female[40] reverses that burden in its criminal statutes, making a young man liable for heavy criminal penalties because of a consensual act of intercourse with a girl only a little younger than himself.[41]

At common law the age of consent was fixed at ten years and as such was not designed to protect the purity of young women but to prevent imposition on children too young to understand the nature or consequences of their consent.[42] When the age of consent is raised to 18 years as it has been in Oklahoma (if the girl is previously chaste, 16 if she is not),[43] clearly some interest is being protected other than her inability to understand. Such a provision can lead to unfair results if no effort is made to give immunity to boys of the same age. The Oklahoma statutes provide such immunity to some extent, resulting in a maze of provisions depending on the age of the boy, the age of the girl and her previous chastity, or lack of it.[44]

Section 1112 makes an act of intercourse with a girl over 14 no crime if the boy is under 18. Application of the fixed age requirement of the statute can lead to irrational results which would be avoided if a sliding age scale were used. Under present Oklahoma statutes a boy of 18 who engages in an act of consensual sexual intercourse with a chaste girl of 17 is guilty of second degree rape. On the other hand, a boy of 17 who engages in the same activity with a girl of at least 14 is guilty of no crime at all. A statute modeled after the Model Penal Code section would avoid the unjust disparity of results in the two instances by fixing an age of consent, but making the act of sexual intercourse a crime only if the boy is four years older than the girl.[45]

A reasonable mistake as to the girl's age is no defense to a charge of sexual intercourse with an underage female in Oklahoma,[46] a rule which imparts an element of strict liability into a statute bearing a maximum penalty of fifteen years. Such a mistake, however, may mitigate severity of the penalty.[47] The need to make a reasonable mistake of age a defense is perhaps best illustrated by *Reid*

[40] *See* Ford, *Sex Offenses: An Anthropological Perspective*, 25 LAW AND CONTEMP. PROB. 225, 233 (1960).

[41] In fact it appears that the adage "there's no harm in asking" has no application in this area, and a man who does may find himself charged with assault with the intent to commit rape in the second degree. *See* Fannin v. State, 65 Okla. Cr. 444, 86 P.2d 671 (1939).

[42] Ploscowe, *Sex Offenses: The American Legal Concept*, 25 LAW & CONTEMP. PROB. 217, 222 (1960).

[43] 21 OKLA. STAT. § 1111 (1961).

[44] In Oklahoma rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under circumstances enumerated in 21 OKLA. STAT. §§ 1111, 1112, 1114 (1961).

[45] MODEL PENAL CODE §§ 213.3, 213.6 (1962).

[46] Law v. State, 92 Okla. Cr. 444, 224 P.2d 278 (1950).

[47] Law v. State, 92 Okla. Cr. 444, 447, 224 P.2d. 278, 279 (1950).

v. State.[48] In that case the defendant was charged and convicted of first degree rape. There was evidence that the girl looked and conducted herself in such a way that a belief that she was chaste would have been entirely unreasonable; and she not only consented to the act for which the defendant was tried, but had engaged in several days of provocative seduction. The court reduced the conviction to second degree rape and modified the sentence to ten years. It is interesting to reflect on exactly what Reid's crime against the people of Oklahoma was and what we gain in terms of revenge, reform and deterrent by his 10 year imprisonment.

Incest

Sexual intercourse between closely related persons is almost universally regarded as a grave offense no matter how private or consensual. Oklahoma is no exception. Our statute provides that if persons who are prohibited from marrying proceed to intermarry, or commit adultery or fornication with each other, they are guilty of incest.[49] The Oklahoma statute which prohibits certain people from intermarrying is among the broadest in the country.[50] It provides that "marriage between ancestors and descendants of any degree, of a stepfather with a stepdaughter, stepmother with stepson, between uncles and nieces, aunts and nephews, except in cases where such relationship is only by marriage, between brothers and sisters of the half as well as the whole blood, and first cousins are declared to be incestuous, illegal, and void, and are expressly prohibited."[51] The maximum punishment for violation of this statute is a ten year penitentiary sentence which is consistent with the maximum penalty exacted by most states.

Oklahoma's incest cases have involved only two relationships: the incestuous marriage of first cousins,[52] and sexual intercourse between fathers and daughters, with the majority of the cases involving father-daughter relationships.[53] In all

[48] 390 P.2d 775 (Okla. Cr. 1955).

[49] 21 OKLA. STAT. § 885 (1961).

[50] England, and over one half of the American states exclude adoptive and step-relations.

[51] 43 OKLA. STAT. § 2 (Supp. 1970). The prohibition against the marriage of first cousins is found in only 18 states, and until 1967 Oklahoma was the only state that prohibited the marriage of second cousins. In 1967, an amendment removed the prohibition against the marriage of second cousins as well as providing that "any marriage of first cousins performed in another state authorizing such marriages, which is otherwise legal, is hereby recognized as valid and binding in this state as of the date of such marriage."

[52] The Oklahoma courts have looked at the marriage of first cousins on three occasions. Two of these concerned division of property from a potentially void marriage. Krauter v. Krauter, 79 Okla. 30, 190 P. 1088 (1920); Thomas v. Brown, 239 F.Supp. 350 (E. D. Okla. 1965). In the only criminal action for incest other than a father-daughter relationship, the court reduced the sentence from nine months to sixty days for a defendant convicted of marrying his first cousin. Groff v. State, 40 Okla. Cr. 55, 266 P. 794 (1928).

[53] Karpman points out that even though brother-sister incest is the most common, it is rarely reported. Father-daughter is less common but more likely to be reported. B. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 102, 103 (1954).

the cases examined, the daughter is the complaining witness and in most instances the sexual intercourse had taken place over a number of years.[54]

These cases are strikingly similar in two aspects. First, even though the acts of intercourse continued for a number of years, the daughters testified that it was always accompanied by force and threats. Second, the defendants argued that charges were brought because of adolescent rebellion and a desire for revenge by the daughters. Thus, the issue is invariably a question of whether the daughter's testimony is corroborated by sufficient evidence.[55]

In view of the Oklahoma cases, the comments to the Model Penal Code seem entirely accurate.[56] It argues that the actual incident of prosecution for incest in our society suggests that the incest laws operate primarily to protect against imposition on young and dependent females. Thus, the modern law of incest should be confined to relationships where a high likelihood of abuse of parental or other familial influence exists.[57]

In addition, some justification for incest laws may be found in the science of genetics, i.e., they may serve the civil and utilitarian function of preventing such inbreeding as would result in defective offspring.[58] Thus, the law of incest should also cover relationships where there is present a relatively clear biological risk.

Finally, it has been suggested that father-daughter incest should be handled differently. It is not really a sex crime, but rather a family problem and the disposition of the offender directly affects the welfare of the infant victim. For example, "it may be harmful to a child victim to feel responsible for a long prison sentence administered to her father, or to be made destitute because the father is rendered unable to support the family. For these reasons, incest should be handled by the juvenile courts, as it is in some states, and the key factor affecting disposition should be the best interests of the family, particularly the offended child."[59]

The Crime Against Nature

Section 886 of Title 21 of the Oklahoma Statutes prescribes a ten-year maximum sentence for that crime which it squeamishly refuses to identify further

[54] In Looper v. State, 381 P.2d 1013 (1963) the defendant allegedly had intercourse with his daughter for at least seven years and had fathered four children. In Matherly v. State, 62 Okla. Cr. 418, 71 P.2d 1094 (1937) the period of incestuous intercourse was allegedly six years.

[55] *Compare* Fitzpatrick v. State, 87 Okla. Cr. 51, 194 P.2d 134 (1948); *and* Matherly v. State, 62 Okla. Cr. 418, 71 P.2d 1094 (1937). Justice Barefoot's dissent in Fitzpatrick is well reasoned. The basis of his argument was that there was even less evidence of incest in *Fitzpatrick* than in *Matherly*. In the latter the court had unanimously held to reverse and discharge the defendant because the testimony of the daughter was not corroborated.

[56] MODEL PENAL CODE § 207.3 Comments (Tent. Draft No. 4, 1955).

[57] MODEL PENAL CODE § 230.2 (1962).

[58] MODEL PENAL CODE § 207.3 Comments (Tent. Draft No. 4, 1955).

[59] Fisher, *The Legacy of Freud*, 40 U. COLO. L. REV. 242, 245 (1968).

than as "destestable and abdominable," "against nature," and capable of commission "with mankind or with a beast."[60] The text of the statute is typical among American jurisdictions.[61] The penalty, which may seem harsh for a statute that sweeps into its wide arc consenting adult sexual activity, is moderate compared to those of many other states.[62]

It is the anomaly of section 886 that, within a system of criminal law which demands its criminal statutes to be drafted with reasonable explicitness, there exists a statute which defines the crime it proscribes only in terms of the most emotionally packed adjectives. In addition, courts required to safeguard the tenet of separation of church and state explain that the statute is not more explicit because "the very alleged sexual behavior is such as should not be described among Christians."[63] It is understandable that the Oklahoma court has created even greater anomalies in attempting to rationalize the specific application of an irrational concept.

The scope of the statute remains uncertain even after an examination of the cases construing it. In answer to a challenge on grounds of vagueness the court of criminal appeals said in *Berryman v. State*:

> We agree with the soundness of the rule that penal statutes should be sufficiently explicit so that one may know what acts are prohibited so that he may not become liable to its penalties, but the abominable and detestible crime against nature, or sodomy as it is sometimes called has always been deemed the pariah of crimes and acts constituting it but seldom specifically defined.[64]

On rehearing of the same case in response to the issue of vagueness the court pointed to the early construction of the statute in *Ex parte Deford*.[65] *Deford*, however, decided only that the statute proscribed oral copulation between humans as well as anal copulation which was the only act within early definitions of sodomy. The case in no way answers what other homosexual or heterosexual activity might fall within the proscription of the statutes. In *Johnson v. State*[66] the court states that the crime against nature includes not only sodomy "but any other act as bestial, or unnatural copulation."

In addition to the problem of definition, section 886 poses disturbing evidentiary problems. The danger of reckless conviction on inadequate evidence is

[60] 21 OKLA. STAT. § 886 (1961) provides that "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten years."

[61] Comment, *The Bedroom Should Not Be Within the Province of the Law*, 4 CALIF. WEST. L. REV. 115, 116 (1968).

[62] MODEL PENAL CODE § 207.5 Comments (Tent. Draft No. 4, 1955).

[63] Berryman v. State, 283 P.2d 558, 563 (Okla. Cr. 1955).

[64] 283 P.2d 558, 563 (Okla. Cr. 1955).

[65] 14 Okla. Cr. 133, 168 P. 58 (1917).

[66] 380 P.2d 234 (Okla. Cr. 1963).

at a maximum when the charge is a sex offense.[67] Such charges too often exist only in the imagination of the complaining witness. The Oklahoma court has recognized this danger:

> The crime charged belongs to that class of offenses of which it has often been said: the charge is easily made, hard to prove and harder still to disprove. In such cases jurors are sometimes moved by abhorance of the offense to convict upon slight evidence, therefore, the court will carefully examine the record to see that there was some substantial evidence to warrant a verdict of guilty.[68]

Yet in *Hill v. State*,[69] the court affirmed a ten year sentence noting only that the evidence was highly conflicting, but presented a question for the jury. In *Hill*, the prosecuting witness, a partially disabled World War II veteran had been arrested for drunkenness and fighting. He was jailed in the same cell as the defendant. There was testimony that at 10 p.m. he was too intoxicated to stand. He testified that at 3 or 4 a.m. as he was crawling about his cell he was violently sexually assaulted by the defendant. Apparently, no jailer heard the disturbance. The defendant denied the act and testified that when the charges were made the following day he had demanded a doctor be called to examine the complaining witness. The only corroborating evidence was the existence of bruises upon the face of the complaining witness, which conceivably could have appeared overnight as a result of the fight for which he had been jailed. It is hard to imagine a set of facts which more clearly demonstrates the need for a requirement of evidence corroborating the witness' testimony in cases involving sex offenses.[70]

While no corroboration is required if the person upon whom the crime was perpetrated claims to have been an unwilling victim,[71] the testimony of a consenting partner requires corroboration because he is by his consent an accomplice to a felony.[72] The logical flaw in the reasoning whereby this standard rule of other felony cases is applied to cases of sodomy would seem to be the question of what will corroborate the testimony that the witness was indeed a victim and not a consenting partner now seeking revenge or to avoid prosecution. Another problem of the no consent-no corroboration rule arises when the consenting partner is a juvenile. Because sodomy is a crime in Oklahoma under any circumstances, there is no statute fixing an age at which consent is competent.[73] Consequently, a very young boy's testimony that he was forced to participate in an act of sodomy requires no corroboration, while the testimony of the same boy that he participated because of an offer of monetary reward requires corroboration. It is difficult to see the logic of the distinction.

[67] Ploscowe, *Sex Offenses: The American Legal Concept*, 25 LAW & CONTEMP. PROB. 217, 222 (1960).

[68] Roberts v. State, 57 Okla. Cr. 244, 256, 47 P.2d 607, 512 (1935).

[69] 368 P.2d 569 (Okla. Cr. 1962).

[70] *See also* Mahone v. State, 209 So.2d 435 (Ala. 1968).

[71] Cole v. State, 83 Okla. Cr. 254, 175 P.2d 376 (1946).

[72] Hopper v. State, 302 P.2d 162 (Okla. Cr. 1956).

[73] Woody v. State, 95 Okla. Cr. 21, 238 P.2d 367, (1951).

The most disturbing aspect of the cases under this statute is that the court of criminal appeals, which freely modifies penalties in the interests of uniform criminal justice, seems to make no distinction in the severity of sentences between cases in which the act was perpetrated forcibly and/or upon a child and those in which the crime grew out of the voluntary act of two adults or near adults. *Hopper v. State*[74] involved a thirty-year-old male defendant, force, and a fourteen-year-old boy victim. The court modified the six-year sentence to four years. *Woody v. State*[75] involved a male defendant whose age did not appear from the record, consent, and a fifteen-year-old boy partner. The sentence of five years was affirmed. *Johnson v. State*[76] involved an adult male defendant, force and several small boys, the youngest only seven. The ten year sentence was affirmed. In striking contrast to the facts in *Johnson* are the facts in *Taylor v. State*.[77] In the *Taylor* case the adult male co-defendants were discovered by a sheriff's car while parked on a country road. The arresting officers testified that the co-defendants had been together in the back seat in a state of undress and were seen scrambling into the front seat as the officers approached. The defendants denied having committed sodomy, but were ultimately convicted on the circumstantial evidence of the officers' testimony. The sentence of eight years in the state penitentiary was affirmed.

The final draft of the Model Penal Code does not make deviate sexual relations between consenting adults a crime. Penalties for other deviate sexual intercourse are graded according to the nature of the imposition and the age of the parties.[78] Had the cases discussed above been decided under this section of the Model Penal Code, the defendant in the *Hopper* case (sentence of four years) would have been liable for a maximum sentence of ten years.[79] The defendant in the *Woody* case (sentence of five years) would have been guilty of no crime at all or subject to a five-year maximum sentence depending on his age.[80] The defendant in the *Johnson* case (sentence of ten years) would have been subject to a maximum of ten years,[81] and the defendant in the *Taylor* case (sentence of eight years) would have been guilty of no crime at all.

Reform of section 886 is inevitable, if not through legislative revision then through the courts. That its prohibitions are intended to apply to consensual sexual acts in the marital bedroom is more than mere speculation from the breadth of the language. In *Cole v. State*[82] the court cites with approval Burdick, *On the Law of Crime*, wherein he discusses the applicability of the prohibition to acts between husband and wife. Further, "the crime against nature" is listed

[74] 302 P.2d 162 (Okla. Cr. 1956).
[75] 95 Okla. Cr. 21, 238 P.2d 367 (1951).
[76] 380 P.2d 284 (Okla. Cr. 1963).
[77] 374 P.2d 786 (Okla. Cr. 1962).
[78] MODEL PENAL CODE § 213.2 (1962).
[79] *See* MODEL PENAL CODE § 213.2(1)(a) (1962).
[80] *See* MODEL PENAL CODE § 213.3(1)(a) (1962).
[81] *See* MODEL PENAL CODE § 213.2(1)(a)(d) (1962).
[82] 83 Okla. Cr. 254, 259, 175 P.2d 376, 379 (1946).

among the exceptions to the statute which excuses a wife from punishment for crimes committed in the presence and with the assent of her husband.[33]

The private relationship between husband and wife has been held by the Supreme Court in *Griswold v. Connecticut*[34] to be among those rights guaranteed by the first amendment. In *Cotner v. Henry*,[35] granting a writ of habeas corpus to a petitioner convicted of a violation of the Indiana sodomy statute with his wife, the court noted that the statute might well be unconstitutional after *Griswold*. In 1970 a three-judge federal court held that a married couple and a male homosexual had standing to intervene for the purpose of challenging the constitutionality of the Texas statute defining sodomy in a prosecution against a confessed homosexual arrested for committing acts of sodomy in public restrooms. The court held the statute to be void on its face for overbreadth, insofar as it reached the rights of married couples, and granted an injunction against its continued enforcement.[36]

Returning now to the three justifications for retention of existing sex laws, what has the Oklahoma experience shown? Lord Devlin's suggestion that society itself determines what is immoral and has the right to punish that immorality[37] is difficult to justify in light of the Oklahoma cases, because, in spite of the vast array of legal statutes relating to sex, few persons are arrested and convicted for sex offenses. It is impossible to believe that the existing laws remain on the books as a reflection of society's morals, and yet remain almost unenforced. If society was really opposed to adultery and private homosexuality, it would insist that these laws be rigidly upheld. It is almost as if, as one cynic has put it, the laws remain unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.[38]

If it can be argued that society has the right to punish when it feels disgust, it must be remembered that the sense of revulsion felt by the average person is probably only occasional and fleeting, and not so upsetting to significant numbers that it interferes with their daily lives. Balanced against this sense of disgust is the criminal law interference with the sexual habits of adult members of society in their expression of a "fundamental right."[39] The conclusion should be that moral conviction or instinctive feeling, however strong, is not a valid basis for

[33] 21 OKLA. STAT. § 157(15) (1961).

[34] 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[35] 394 F.2d 873 (7th Cir. 1968).

[36] Buchanan v. Batchelor, 308 F.Supp. 729 (N. D. Tex. 1970).

[37] It is of interest to note that Lord Devlin, who was the leading critic of the Wolfenden Report for years solely on the basis of the above philosophy, has at least somewhat modified his position, and later has urged the adoption of the Report. *See* The London Times, May 11, 1965, at 13.

[38] Slovenko, *Sex Mores and the Enforcement of the Laws on Sex Crime: A Study of the Status Quo*, 15 KAN. L. REV. 265, 271 (1967).

[39] Comment, *Private Consensual Homosexual Behavior: The Crime and its Enforcement*, 70 YALE L. J. 623 (1961).

overriding the individual's privacy and for bringing private consensual behavior within the ambit of the criminal law.[90]

Retaining existing sexual laws because of their possible deterrent effect does not seem to be justified. There is little correlation between the amount and type of sexual behavior which actually occurs and the laws governing that behavior. In addition, European countries which no longer prohibit private consensual homosexual activity have not experienced a noticeable increase in such behavior.[91]

It is unrealistic to legislate against sin where a clear consensus is lacking and social change challenges old values.[92] The criminal law and traditional legal procedures have at best a minimal efficacy when it comes to such matters as enforcement of morality. In the final analysis, chief reliance must be placed upon extra-legal means of social control such as religion and public opinion. For example, "disapproval of homosexuality is so strongly embedded in our society, that abolition of criminal sanctions may not weaken it, especially if accompanied by a legislative disclaimer of approbation."[93]

The argument that the laws are enforced only when minors are involved, force is used, or the activity is carried on publicly, is not realistic. It ignores the reality of the harm from continuing to carry these dead letter statutes. Although such private acts are unlikely to come to judicial attention, the possibility that they will do so through pique or anger is always present.

More importantly, it does not accurately portray the Oklahoma experience. The cases clearly reflect enforcement against individuals whose activity neither involved force, children or the public.[94] Since the retention of existing laws contains potential for harm by its enforcement against private consensual activity, it is desirable to change the law.

By refusing to change existing laws, lawmakers are failing the legal system and the society that depends on it. By retaining unenforceable laws dealing with private sexual activities the law is brought into disrespect.[95] The retention of these laws also makes possible discriminatory application, for example, where because of racial prejudice authorities choose to charge offenders with a more serious offense.[96]

President Hoover in connection with the famous Wickersham Commission wrote:

> The most malign of all . . . dangers [to the State] today is disregard and disobedience of law . . . our whole system of self-government will crumble either if officials elect what laws they will enforce or citizens elect

[90] Committee on Homosexual Offenses and Prostitution, n.16 at 54.

[91] *Id.* at 47.

[92] Foster & Freed, *Offenses Against the Family*, 32 U.M.K.C.L. Rev. 33, 113 (1964).

[93] Comment, *Public Consensual Homosexual Behavior: The Crime and its Enforcement*, 70 Yale L. J. 623, 630 (1961).

[94] For example *see* Reid v. State, 290 P.2d 775 (Okla. Cr. 1955), and Taylor v. State, 374 P.2d 786 (Okla. Cr. 1962).

[95] Model Penal Code § 207.1 Comments, (Tent. Draft No. 4, 1955).

[96] Foster & Freed, *Offenses Against the Family*, 32 U.M.K.C.L. Rev. 33, 102 (1964).

what laws they will support. The worst evil of disregard for some laws is that it destroys respect for all law. . .[97]

Perhaps the most serious harm to the individual citizen resulting from failure to reform these laws is the potential for blackmail and extortion.[98] This society cannot continue to subject its citizens to these threats and dangers simply because it refuses to reform laws that are not enforced.

In summary, Oklahoma today is in the paradoxical situation of prescribing severe criminal punishment for behavior which in no way harms the state, and yet this very prescription harms many of its citizens. This governmentally created evil is repugnant to all justifications for criminal sanctions. The power of the state should not be used to enforce purely private morality. It is "inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor."[99]

Fortunately, this situation will not be allowed to continue. In time, either the legislature of Oklahoma will reform these laws to exclude from its prohibition private consensual acts, or the courts will. *Griswold*[100] and *Buchanan*[101] are signal lights for future courts to follow.

Legislating and enforcing private morality is a matter of cultural attitudes, and the most noticeable feature of these is their propensity to change.[102] This is reflected by the Illinois experience. Shortly before the turn of the century, an Illinois court, in referring to sodomy, could say, "The existence of such an offense is a disgrace to human nature."[103] But in 1961 the Illinois legislature removed private consensual sodomy from the category of crime in that state.

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Criminal Law: Plea Withdrawal in Oklahoma

Conviction without trial, through the use of plea agreements, is recognized by prosecutors, judges and defense counsel as a necessary and proper part of the

97 Cited in ARNOLD, THE SYMBOLS OF GOVERNMENT 151 (1935).

98 Illustrative of the reality and immediacy of this problem is a news item in March, 1966, when the nation's press headlined the news that the district attorney and police of New York City, in cooperation with the Federal Bureau of Investigation, had uncovered a nation-wide racket operated by a ring of some seventy or more men who had extorted over a million dollars from several thousand homosexuals during the last decade. Among the victims were a Congressman, an Admiral, a General, a British producer, a minister, two well-known singers, a TV personality, a movie actor, a musician, two University deans and many others. Some of the victims who refused or were reluctant to pay were beaten up; others lost their jobs and suffered broken marriages and homes when the blackmailers notified their employers or families by letter or telephone. New York Times, Mar. 3, 1966, pp. 1, 25; May 17, pp 1, 35; July 12 p.31, Sept. 28. p. 39, 1967.

99 MODEL PENAL CODE § 207.1 Comments (Tent. Draft No. 4 1955).

100 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

101 308 F.Supp. 729 (N. D. Tex. 1970).

102 Comment, *Sex Laws in Ohio: A Need for Revision*, 35 UNIV. OF CINN. L. REV. 211 (1966).

103 Houselman v. People, 168 Ill. 172, 175, 48 N.E. 304, 305 (1897).